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said [5] 395/8 395/22 398/24 401/10 408/16 same [3] 396/21 398/11 398/15 SANDS [1] 390/25 saw [1] 399/5 say [3] 393/1 398/4 400/22 seated [1] 401/14 second [4] 393/7 395/23 400/8 403/12 see [3] 396/1 398/6 399/6 seeking [7] 393/9 393/14 393/15 393/17 393/19 393/21 396/10 send [4] 394/4 396/14 401/19 401/20 sending [1] 403/1 sense [1] 398/11 sentence [2] 403/11 403/12 separate [1] 393/25 serve [1] 403/13 session [1] 392/4 several [1] 392/20 sharp [1] 399/2 sheet [1] 395/11 should [4] 396/11 398/19 400/25 408/10 show [1] 402/17 similar [2] 403/2 403/14 similarly [1] 396/20 simple [1] 400/14 sit [3] 402/13 404/4 406/1 situated [1] 396/21 Sixth [1] 394/15 so [11] 396/1 396/22 397/10 398/6 398/20 399/5 399/10 401/4 402/18 403/5 403/12 something [1] 402/16 sound [1] 396/23 speak [1] 397/22 special [6] 395/10 398/23 400/7 400/12	W wages [1] 396/6 want [8] 394/25 398/8 400/10 400/22 401/20 401/20 402/4 408/18 wanted [2] 399/19 401/5 warning [1] 403/13 warranted [1] 399/11 was [25] ways [1] 397/6 we [29] we've [1] 398/11 WEINSTEIN [3] 390/10 392/4 392/5 well [1] 397/21 were [6] 394/7 396/6 397/9 397/9 399/4 399/5 what [27] when [1] 398/25 where [4] 395/23 396/5 399/11 403/17 Whereupon [1] 403/19 whether [1] 399/2 which [7] 394/1 396/15 397/10 398/10 398/15 399/8 402/21 while [1] 399/10 who [1] 403/14 whole [1] 396/19 why [1] 408/10 will [2] 397/22 404/7 willfully [1] 399/8 wish [4] 395/5 395/6 402/16 408/15 without [2] 396/10 403/15 won't [1] 401/16 Woolworth [1] 390/15 would [24] would've [3] 402/19 402/21 402/22	
	Y years [1] 398/11 Yes [37] yesterday [3] 400/23 401/1 401/9 YORK [10] 390/1 390/5 390/6 390/16	
	T take [1] 404/5 taken [1] 403/19 takes [1] 392/5 talk [3] 401/17 408/15 408/18 Telephone [1] 391/2 Tell [1] 392/11 telling [1] 396/11 testified [1] 393/10 testimony [5] 394/16 397/11 398/10 398/12 398/15 thank [10] 395/13 399/13 400/19 401/7 401/12 402/1 406/1 408/14 408/20 409/2 that [96] that's [7] 394/5 397/8 397/21 401/8 401/24 403/1 403/3 their [4] 395/2 395/3 399/4 402/25 them [3] 392/11 401/4 402/15 themselves [1] 401/5 then [2] 393/16 409/2 there [8] 395/25 396/6 396/6 397/11 397/19 399/8 399/10 408/10 there's [5] 397/2 397/5 398/6 399/1 399/2 thereto [1] 394/23 these [3] 394/4 399/9 400/12 they [21] they're [2] 399/7 400/13 think [6] 395/1 396/4 398/14 403/7 403/16 408/24 Third [1] 394/3 this [16] 392/15 396/5 396/18 397/10 398/2 398/24 399/12 400/14 401/18 402/6 402/6 402/8 402/20 403/23 404/1 408/25 those [3] 396/10 397/8 397/12 though [1] 398/13 through [3] 397/3 401/16 401/18 time [7] 393/19 393/23 393/24 393/24 395/3 397/16 398/8 today [2] 401/2 403/21 told [1] 403/5 too [2] 402/12 402/14 tortfeasors [1] 396/19 transcript [6] 390/10 391/5 394/21 394/24	

A1325

Y		
YORK... [6] 390/16 390/22 390/23 390/23 392/3 392/8 you [37] you'd [1] 401/16 You're [1] 408/14 your [34]		
Z		
Zelna [1] 400/8		

A1326

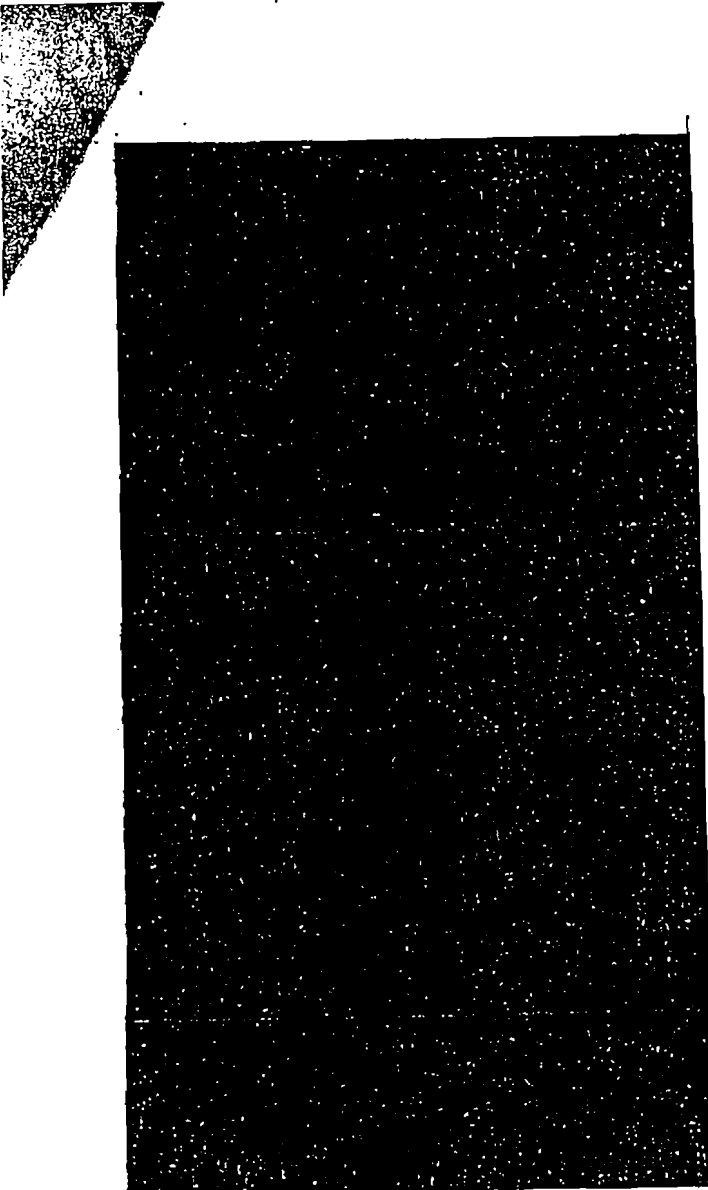
PLAINTIFF'S EXHIBIT 1-IN EVIDENCE

Excerpt of Memobook

(pp. A1326-A1328)

REPRODUCED FOLLOWING

A1327



Wednesday 05/14/69 Tour:
1730 x 0205 Assignment: RNAC;
1730 present for duty + RNAC;



NYC 7



A1328

1930 10-98 in RMP# 8815
w/ P.O. Burbridge & P.O. Fox;
2250 ~~by P.O. Fox~~
2320 C. J. INSPECTION
0045 Marshall, Joshua
placed under arrest for CPL 20;
0638 ready time;
0805 end of tour, P.O. Randall
tax # 933231

NYC 8

A1329

PLAINTIFF'S EXHIBIT 2-IN EVIDENCE
NYPD Complaint Report Worksheet, Dated May 15, 2008
(pp. A1329-A1333)

REPRODUCED FOLLOWING

A1330

COMPLAINT REPORT WORKSHEET
FD-313-102A (Rev. 08-07)

Complaint Number: 063		Jurisdiction Of Complaint: NYPD (Unless One Of The Following):	
<input type="checkbox"/> NYPD Transit Bureau <input type="checkbox"/> NYPD Housing Bureau <input type="checkbox"/> Port Authority Police <input type="checkbox"/> Triborough Bridge And Tunnel Police <input type="checkbox"/> N.Y. State Park Police		<input type="checkbox"/> Amtrak Police <input type="checkbox"/> Cornell Police <input type="checkbox"/> Staten Island Rapid Transit Police <input type="checkbox"/> N.Y. State Police <input type="checkbox"/> Long Island Railroad M.T.A. <input type="checkbox"/> U.S. Park Police <input type="checkbox"/> Health & Hospital's Comp. Police <input type="checkbox"/> Metro North M.T.A. <input type="checkbox"/> Other	
Location Of Occurrence <input type="checkbox"/> Inside <input type="checkbox"/> In Front Of <input type="checkbox"/> Near Of <input type="checkbox"/> Opposite Of		Address: KINGS	
Case Number: A		Intersection Of: PARK ST & BROADWAY	
Mailing Name And Date Of This Report: 0123 01/10/08		Occurrence On Or From: 0842 01/10/08	
Pri Of Occ: 063		Log Case #: 35623	
Report Classification (If Offense, List Most Serious First): CPU		Log Case #: 35623	
Was The Victim's Personal Information Taken Or Possessed?		Was The Victim's Personal Information Used To Commit A Crime?	
<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
Camp Name: <input type="checkbox"/> Radio <input type="checkbox"/> Walk In <input type="checkbox"/> Phone <input type="checkbox"/> Written By: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		Post Of Occ: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
Premises Type (Must Choose One):		Damage Caused By: <input type="checkbox"/> Explosion <input type="checkbox"/> Fire <input type="checkbox"/> Other	
<input type="checkbox"/> Residential: <input type="checkbox"/> Single House <input type="checkbox"/> Multi-Family <input type="checkbox"/> Public Housing <input type="checkbox"/> Commercial: <input type="checkbox"/> Candy Store <input type="checkbox"/> Check Cashing Business <input type="checkbox"/> Clothing Boutiques <input type="checkbox"/> Beauty & Nail Salon <input type="checkbox"/> Bank/ATM Store <input type="checkbox"/> Department Store		<input type="checkbox"/> Public Transportation: <input type="checkbox"/> Airport Terminal <input type="checkbox"/> Bus Terminal <input type="checkbox"/> Ferry/Terminal <input type="checkbox"/> Taxi (Yellow Licensed) <input type="checkbox"/> Taxi (Yellow Licensed) <input type="checkbox"/> Transit Facility (LIRR)	
Indicate Name Of Business:		Indicate Name Of Business:	
<input type="checkbox"/> Other: <input type="checkbox"/> Cemetery <input type="checkbox"/> Construction Site <input type="checkbox"/> Highway/Partway		<input type="checkbox"/> Other: <input type="checkbox"/> Parking Lot/Storage <input type="checkbox"/> Public Building <input type="checkbox"/> Other	
Exact Location Within Premises Type, If Known (Choose One):		Exact Location Within Premises Type, If Known (Choose One):	
<input type="checkbox"/> Apartment <input type="checkbox"/> Elevator Equipment Room <input type="checkbox"/> Maintenance/Storage Area <input type="checkbox"/> Rest Room <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Basement <input type="checkbox"/> Freight Elevator <input type="checkbox"/> Management Office <input type="checkbox"/> Roof <input type="checkbox"/> Car <input type="checkbox"/> Commercial Establishment <input type="checkbox"/> Garage <input type="checkbox"/> Other Office <input type="checkbox"/> Roof Top Landing <input type="checkbox"/> Motorcycle <input type="checkbox"/> Community Center <input type="checkbox"/> Hallway <input type="checkbox"/> Parking Lot <input type="checkbox"/> Stairway <input type="checkbox"/> Truck <input type="checkbox"/> Delivery <input type="checkbox"/> Laundry Room <input type="checkbox"/> Play/Park Area <input type="checkbox"/> Terrace <input type="checkbox"/> Other <input type="checkbox"/> Elevator <input type="checkbox"/> Lobby/Down/Vestibule <input type="checkbox"/> Public Sidewalk <input type="checkbox"/> Walkways		<input type="checkbox"/> Vehicle <input type="checkbox"/> Truck <input type="checkbox"/> Location of Entry: <input type="checkbox"/> Front <input type="checkbox"/> Rear <input type="checkbox"/> Burglary, Describe: <input type="checkbox"/> Burglary, Describe: <input type="checkbox"/> Burglary, Describe: <input type="checkbox"/> Burglary, Describe: <input type="checkbox"/> Burglary, Describe:	
Burglary, Describe: <input type="checkbox"/> Burglary, Describe: <input type="checkbox"/> Burglary, Describe: <input type="checkbox"/> Burglary, Describe: <input type="checkbox"/> Burglary, Describe:		Burglary, Describe: <input type="checkbox"/> Burglary, Describe: <input type="checkbox"/> Burglary, Describe: <input type="checkbox"/> Burglary, Describe: <input type="checkbox"/> Burglary, Describe:	
Supervisor On Scene: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		Witness Interpreter Used: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
Form: Form (Print)		Form: Form (Print)	
Interviews Conducted: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		Interviews Conducted: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	

AT T/P/O Above Doft. was found to be in possession of a
Loaded Firearm.

NYC 10

PLAINTIFF'S
EXHIBIT

2

A1332

N.Y.C. DEPT. OF ED. SCHOOLS	N.Y.C. Dept. Of Ed. School		<input type="checkbox"/> On School Property		Traveling		School Sponsored Event		School Safety Driven Operations	
	Incident: <input type="checkbox"/> Yes <input type="checkbox"/> No		<input type="checkbox"/> During School Hours		<input type="checkbox"/> To School <input type="checkbox"/> From School		<input type="checkbox"/> Yes <input type="checkbox"/> No		Control #	
	Victim Status: <input type="checkbox"/> General Ed. Student		<input type="checkbox"/> Special Ed. Student		<input type="checkbox"/> Resource Room/Related Services		<input type="checkbox"/> Teacher		<input type="checkbox"/> School Safety Rep.	
	<input type="checkbox"/> Other Staff		<input type="checkbox"/> Other (Specify)							
N.Y.C. DEPT. OF ED. SCHOOLS	Type of School: <input type="checkbox"/> Elementary		<input type="checkbox"/> HS		School Number		School Name			
	<input type="checkbox"/> JHS		<input type="checkbox"/> HS		<input type="checkbox"/> SA-ED					
	Exact Location On School Property: <input type="checkbox"/> Hall		<input type="checkbox"/> Cafeteria		<input type="checkbox"/> Classroom #		<input type="checkbox"/> Staircase #			
	<input type="checkbox"/> Gym/Locker Room		<input type="checkbox"/> Bathroom #		<input type="checkbox"/> Playground/Field		<input type="checkbox"/> On-School Grounds		<input type="checkbox"/> Auditorium	
N.Y.C. DEPT. OF ED. SCHOOLS	Suspect Status: <input type="checkbox"/> General Ed. Student		<input type="checkbox"/> Special Ed. Student		<input type="checkbox"/> Resource Room/Related Services		<input type="checkbox"/> Teacher		<input type="checkbox"/> Other Staff (Title)	
	<input type="checkbox"/> Student Intruder		<input type="checkbox"/> Intruder		<input type="checkbox"/> Visitor		<input type="checkbox"/> Family Member		<input type="checkbox"/> Unknown	
	NYC Transit Incident: <input type="checkbox"/> Yes <input type="checkbox"/> No		Station Of Occurrence		Line (If On Letter)		Transit Post #		Transit District	
	Victim's Time And Station Of Entry Into Transit System, If Known		Make Card		Type: <input type="checkbox"/> Student		<input type="checkbox"/> Standby		Main Card	
N.Y.C. DEPT. OF ED. SCHOOLS	<input type="checkbox"/> NYS Train		<input type="checkbox"/> B/B Train		Location On Train: <input type="checkbox"/> Front		<input type="checkbox"/> Middle		<input type="checkbox"/> Rear	
	<input type="checkbox"/> NYS Platform		<input type="checkbox"/> S/B Platform		<input type="checkbox"/> Booth #		<input type="checkbox"/> Transfer Area		<input type="checkbox"/> Mezzanine	
	<input type="checkbox"/> Elevator		<input type="checkbox"/> Tunnel/Track Area		<input type="checkbox"/> Passage Way		<input type="checkbox"/> Toilet Facility		<input type="checkbox"/> Street Subway/St. Escalator	
	<input type="checkbox"/> Other		<input type="checkbox"/> Other		<input type="checkbox"/> Other		<input type="checkbox"/> Other		<input type="checkbox"/> Other	
N.Y.C. DEPT. OF ED. SCHOOLS	NYC Transit Authority Incident: <input type="checkbox"/> Yes <input type="checkbox"/> No		Name Of Development		PSA #		Transit Report #			
	Total # Of Victims		Victim #		Of		Victims		In Victim: <input type="checkbox"/> Male <input type="checkbox"/> Female (Disabled <input type="checkbox"/> Yes <input type="checkbox"/> No)	
	If (Business/Corporate/Other) Ltd. Name		Address		City		State		Zip	
	If Person, Last Name		First		MI		Is Interpreter Needed For Further Investigation: <input type="checkbox"/> Yes <input type="checkbox"/> No		If Yes, Indicate Language	
N.Y.C. DEPT. OF ED. SCHOOLS	Nicknames/Alas/Maiden Name		Sex: <input type="checkbox"/> Male		Date Of Birth		Age		Race: <input type="checkbox"/> White	
	<input type="checkbox"/> Female		<input type="checkbox"/> Female		<input type="checkbox"/> Am. Ind./Alaskan Native		<input type="checkbox"/> Asian/Pacific Is.		<input type="checkbox"/> Other	
	Permanent Residence Address (NYC/CHYS/Other)		City		State/Country		Zip		Apt # / Room #	
	Temporary Residence Address		City		State		Zip		Apt # / Room #	
N.Y.C. DEPT. OF ED. SCHOOLS	Business Address		City		State		Zip		Apt # / Room #	
	Home Phone #		Business #		Cell Phone #		Fax #		E-Mail Address	
	Gang Affiliation: <input type="checkbox"/> Yes <input type="checkbox"/> No		If Yes, Indicate Name Of Gang		Gang Members (Colors, Beards, Tattoos, Etc.)					
	Victim Worn: <input type="checkbox"/> Shirt <input type="checkbox"/> Cuff/Straps/Slashed		Actions Of Victim Prior To Incident (Be Specific)							
N.Y.C. DEPT. OF ED. SCHOOLS	Victim Of Sexual Incident (EXCEPT SEX OFFENSE): <input type="checkbox"/> Yes <input type="checkbox"/> No		If Yes, When And Where							
	View Photo: <input type="checkbox"/> Yes <input type="checkbox"/> No		View Photo: <input type="checkbox"/> Yes <input type="checkbox"/> No		View Photo: <input type="checkbox"/> Yes <input type="checkbox"/> No		View Photo: <input type="checkbox"/> Yes <input type="checkbox"/> No		View Photo: <input type="checkbox"/> Yes <input type="checkbox"/> No	
	Reporter: <input type="checkbox"/> Reporter <input type="checkbox"/> Witness		Last Name		First		MI		Is Interpreter Needed For Further Investigation: <input type="checkbox"/> Yes <input type="checkbox"/> No	
	Nicknames/Alas/Maiden Name		Sex: <input type="checkbox"/> Male		Date Of Birth		Age		Race: <input type="checkbox"/> White	
N.Y.C. DEPT. OF ED. SCHOOLS	<input type="checkbox"/> Female		<input type="checkbox"/> Female		<input type="checkbox"/> Am. Ind./Alaskan Native		<input type="checkbox"/> Asian/Pacific Is.		<input type="checkbox"/> Other	
	Permanent Residence Address (NYC/CHYS/Other)		City		State/Country		Zip		Apt # / Room #	
	Temporary Residence Address		City		State		Zip		Apt # / Room #	
	Business Address		City		State		Zip		Apt # / Room #	

NYC 13

NYC 14

A1334

PLAINTIFF'S EXHIBIT 3-IN EVIDENCE

Redacted_NYPD Evidence Collection Team Report, Dated May 15, 2008
(pp. A1334-A1335)

REPRODUCED FOLLOWING

A1335


**EVIDENCE COLLECTION
TEAM REPORT**
PD 521-157 (09-07)
Date of Report 5/15/08 Page 1 of 1

ECT MOS Reporting (Rank, Name) <u>P.O. SENA, JOSEPH</u>		Command <u>BNECT</u>		Tax No. <u>902396</u>	
ECT Run No. <u>1267</u>	Date Response Requested <u>5/15/08</u>	Time Response Requested <u>0600</u>	Date Arrived At Scene <u>5/15/08</u>	Time Arrived At Scene <u>0839</u>	
Address of Occurrence <u>c/o PARK ST + Broadway</u>			Type of Premises <u>Street</u>		
Describe Location <u>Street</u>		Weather Conditions <u>cloudy</u>		Scene Lighting <u>N/A</u>	
Offense(s) <u>CPW</u>			Complaint No. (Year-Pct.-No.) <u>2008-083-03562</u>		
Name of Victim <u>PSNY</u>		Date of Birth <u>N/A</u>		Injured? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If Yes, Hospital Removed To <u>N/A</u>	
Evidence Collected? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Prints Lifted? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Was Evidence Recovered as Result of Search Warrant? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Was Evidence Vouchered? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Total No. Of Vouchers <u>2</u>	
Voucher No(s). 1. <u>P2002-05</u> 2. <u>P2002-08</u> 3. <u>N/A</u> 4. <u>N/A</u> 5. <u>N/A</u>					
Processed Vehicle Make/Model <u>N/A</u>		Year	U.C. Plate No.	State	VIN No.
Name <u>MARSHALL, JOSHUA</u>		Date of Birth <u>7/6/80</u>	Arrest No. <u>K08644325</u>	Pct. <u>83 pct.</u>	NYSID No.
1. <input checked="" type="checkbox"/> Arrested <input type="checkbox"/> Suspect					
2. <input type="checkbox"/> Arrested <input checked="" type="checkbox"/> Suspect <u>N/A</u>					

Details: Include Method of Operation (Means of Entry, Tools Used, Property Handled, Descriptions, etc.) and Other Pertinent Information

ECT was requested to 77 pct Annex @ 653 Grand Ave. to process a firearm in regards to arrest. A/O (P.O. RANDALL, SALIM TAX#933231) States Firearm (silver .38 S&W serial #CDK7342) was recovered in the street c/o Park St + Broadway. The undersigned did swab firearm for Contact DNA EVIDENCE of possible skin cells, and also fired firearm @ the Annex in an attempt to retrieve possible latent print yielding negative results. [REDACTED] Responded to annex with P.O. ACEVEDO, JULIO TAX#905610 BNECT. Conformed with P.O. RANDALL, SALIM TAX#933231 from PBDN-AC. Sgt. BISCARDI, Douglas TAX#923560 from PBDN-AC.

Head stamp of Live cartridges: RP. 38 Special

PHOTO LOG (DNA Evidence ONLY)			
Camera Make <u>Nikon</u>	Camera Model <u>F80</u>	Lens Type <u>24-120 mm</u>	Type of Film <u>400</u>
PHOTO NO.	DESCRIPTION OF IMAGE IN PHOTOGRAPH		
01	Olv of (silver .38 S&W) Firearm & (6) Live Cartridges		
02	S/A/A		
03	Olv of firearm & Live Cartridges inside EVIDENCE BOX		

ECT MOS Reporting Signature <u>[Signature]</u>		Tax No. <u>902396</u>	Date <u>5/15/08</u>
Del. Bur. Supervisor (Rank, Name Printed) <u>Sgt. Mollin</u>		Tax No. <u>922843</u>	Date <u>5/15/08</u>
ECT Supervisor (Rank, Name Printed)		Tax No.	Date

DISTRIBUTION: White - OCME-Forensic Biology Unit Blue - Assigned Investigator Green - Police Laboratory
Buff - ECT Pink - Latent Print Section

**PLAINTIFF'S
EXHIBIT**

3

A1336



PLAINTIFF'S EXHIBIT 6-IN EVIDENCE

Arrest Report
(pp. A1336-A1339)

REPRODUCED FOLLOWING

A1337

Case 1:19-cv-02714-WYP Document 24-1 Filed 09/09/11 Page 37 of 58 Page ID #: 1713
ARREST Report - K08644325

	New York City Police Department Omniform System - Arrests																			
RECORD CONTAINS SEALED INFORMATION. THIS RECORD MAY NOT BE MADE AVAILABLE TO ANY PERSON OR PUBLIC OR PRIVATE AGENCY OUTSIDE THE POLICE DEPARTMENT.																				
RECORD STATUS: SEALED		Arrest ID: K08644325 - Y																		
Arrest Location: NORTH EAST CORNER PARK STREET & BROADWAY		Pct: 083																		
Arrest Date: 05-15-2008 Processing Type: ON LINE Time: 00:45:00 OCJS Fax Number: K0036613 Sector: F Special Event Code: - DAT Number: 0 Stop And Frisk: NO Return Date: 0000-00-00 Serial #: 0000-000-00000																				
COMPLAINTS:		Arrest #: K08644325																		
<table border="1"> <thead> <tr> <th>COMPLAINT NUMBER</th> <th>REPORT DATE</th> <th>RECORD STATUS</th> <th>OCCUR DATE</th> <th>OCCUR TIME</th> </tr> </thead> <tbody> <tr> <td>2008-083-03562</td> <td>2008-05-15</td> <td>Valid, Initial Arrests made</td> <td>2008-05-15</td> <td>00:42</td> </tr> </tbody> </table>			COMPLAINT NUMBER	REPORT DATE	RECORD STATUS	OCCUR DATE	OCCUR TIME	2008-083-03562	2008-05-15	Valid, Initial Arrests made	2008-05-15	00:42								
COMPLAINT NUMBER	REPORT DATE	RECORD STATUS	OCCUR DATE	OCCUR TIME																
2008-083-03562	2008-05-15	Valid, Initial Arrests made	2008-05-15	00:42																
SEALED		SEALED																		
CHARGES:		Arrest #: K08644325																		
<table border="1"> <thead> <tr> <th>CHARGE ATTEMPT?</th> <th>LAW CODE</th> <th>CLASS</th> <th>TYPE</th> <th>COUNTS</th> <th>DESCRIPTION</th> </tr> </thead> <tbody> <tr> <td>TOP No</td> <td>PL 265.03</td> <td>03 F</td> <td>C</td> <td>1</td> <td>CPW-2ND: LOADED FIREARM</td> </tr> <tr> <td>#02 No</td> <td>PL 165.45</td> <td>04 F</td> <td>E</td> <td>1</td> <td>CPSP-4TH: FIREARMS</td> </tr> </tbody> </table>			CHARGE ATTEMPT?	LAW CODE	CLASS	TYPE	COUNTS	DESCRIPTION	TOP No	PL 265.03	03 F	C	1	CPW-2ND: LOADED FIREARM	#02 No	PL 165.45	04 F	E	1	CPSP-4TH: FIREARMS
CHARGE ATTEMPT?	LAW CODE	CLASS	TYPE	COUNTS	DESCRIPTION															
TOP No	PL 265.03	03 F	C	1	CPW-2ND: LOADED FIREARM															
#02 No	PL 165.45	04 F	E	1	CPSP-4TH: FIREARMS															
DWI Arrest from:	# Injured: 00	# Fatalities: 00	Test Given:	B.A.C:	Reason Not Forfeited:															
SEALED		SEALED																		
DETAILS:		Arrest #: K08644325																		
AT TIME ABOVE DEFT. WAS FOUND IN POSSESSION OF A LOADED FIREARM. SER. #CDK7342.																				
SEALED		SEALED																		
DEFENDANT: MARSHALL, JOSHUA J		NYSID #: 08661204R		Arrest #: K08644325																
Nick/AKA/Maiden: Sex: MALE Race: WHITE HISPANIC Age: 27 Date Of Birth: 07/06/1990 U.S. Citizen: YES Place Of Birth: Need Interpreter: NO Language: Accent: NO		Height: 6FT 3IN Weight: 260 Eye Color: BROWN Hair Color: BLACK Hair Length: LONG Hair Style: PONY TAIL Skin Tone: LIGHT Complexion: BLOTCHY Soc. Security #: Occupation: UNKNOWN		Order Of Protection: NO Issuing Court: Docket #: Expiration Date: Relation to Victim: STRANGER Living together: NO Can be Identified: YES Gang Affiliation: NO																



A1338

Case 1:10-cv-02714-BW-MJP Document 24-1 Filed 09/09/11 Page 38 of 58 PageID #: 1723

Physical Condition: APPARENTLY NORMAL Lic/Permit Type: Drug Used: NONE Lic/Permit No		Name: Identifiers:	
LOCATION	ADDRESS	CITY	STATE/CNTRY ZIP APT/ROOM PCT
HOME-PERMANENT	482 GRAHAM AVENUE	BROOKLYN NEW YORK	094
Phone # and E-Mail Address:			
N.Y.C.H.A. Resident: NO N.Y.C. Housing Employee: On Duty: Development: N.Y.C. Transit Employee:			
Physical Force: NONE			
Gun:	HANDGUN		
Weapon Used/Possessed:	POSSESSED	Make: SMITH & WESSON	Recovered:
Non-Firearm Weapon:		Color: SILVER	Serial Number Delaced:
Other Weapon Description:		Caliber: .38 CAL	Serial Number:
	Type: PISTOL, REVOLVER		
	Discharged: NO		
Used Transit System: NO			
Station Entered:			
Time Entered:			
Metro Card Type:			
Metro Card Used/Poses:			
Card #:			
CRIME DATA	DETAILS		
STATEMENTS MADE	NA		
METHOD OF FLIGHT	NA		
MODUS OPERANDI	UNKNOWN		
ACTIONS TOWARD VICTIM	UNK		
CLOTHING	HEADGEAR - BASEBALL HAT - BROWN		
CLOTHING	FOOTWEAR - UNK - UNKNOWN COLOR		
CLOTHING	OUTERWEAR - UNK - UNKNOWN COLOR		
CLOTHING	ACCESSORIES - UNK - UNKNOWN COLOR		
CHARACTERISTICS	UNKNOWN		
BODY MARKS	-UNKNOWN		
BODY MARKS	-UNKNOWN		
IMPERSONATION	UNKNOWN		
SEALED		SEALED	
JUVENILE DATA:		Arrest #: K08644325	
Juvenile Offender:	Relative Notified: Personal Recog:		
Number Of Priors: 0	Name:		
School Attending:	Phone Called:		
Mother's Maiden Name:	Time Notified:		
SEALED		SEALED	
ASSOCIATED ARRESTS:		Arrest #: K08644325	
ARREST ID COMPLAINT #			
SEALED		SEALED	
DEFENDANTS CALLS:		Arrest #: K08644325	
CALL # NUMBER DIALED NAME CALLED			

A1339

ARREST REPORT K08644325 Document 24-1 Filed 09/09/11 Page 39 of 58 Page 1783

1 .. REFUSED			
SEALED		SEALED	
INVOICES:			Arrest #: K08644325
INVOICE#	COMMAND	PROPERTY TYPE	VALUE
P200205	083	FIREARMS/WEAPONS	UNKNOWN
SEALED		SEALED	
ARRESTING OFFICER: POM SALIM RANDALL			Arrest #: K08644325
Tax Number: 933231		On Duty: YES	
Other ID (non-NYPD): 933231		In Uniform: NO	
Shield: 16331		Squad: 1	
Department: NYPD		Chart: 07	
Command: 187		Primary Assignment:	
Force Used: NO		Type:	
Reason:		Officer Injured: NO	
SEALED		SEALED	
Arresting Officer Name:		Tax #:	Command:
POM RANDALL, SALIM		933231	187
Supervisor Approving:		Tax #:	Command:
SGT BISCARDI DOUGL		923660	187
Report Entered by:		Tax #:	Command:
SGT BISCARDI, DOUG		923660	187
Agency: NYPD		Agency: NYPD	
		END OF ARREST REPORT K08644325	
			

A1340

PLAINTIFF'S EXHIBIT 11-IN EVIDENCE

Stop, Search and Frisk Report
(pp. A1340-A1342)

REPRODUCED FOLLOWING

A1341

(COMPLETE ALL CAPTIONS)

STOP, QUESTION AND FRISK REPORT WORKSHEET
PD344-151A (Rev. 11-02)

Pct. Serial No. 515/08 Pct. Of Sec. 08

Type Of Stop Officer's Observation Pct. To Stop 100% Radio Run/Serial # 1088644354

Address/Interlocking Or Cross Streets Of Stop 450 Craven Ave

☒ Inside ☐ Transit ☐ Type Of Location Street

☒ Outside ☐ Housing ☐ Describe: Street

Specify Which Felony/P. Misdemeanor Suspected Aggravated Assault Duration Of Stop 15 minutes

What Were Circumstances Which Led To Stop?
(MUST CHECK AT LEAST ONE BOX)

☐ Carrying Objects In Plain View ☐ Actions Indicative Of Engaging In Drug Transaction.

☐ Used In Commission Of Crime ☒ Furtive Movements

☐ e.g., Slim Jim/Phy Bar, etc.

☐ File Description ☐ Actions Indicative Of Engaging In Violent Crimes.

☐ Actions Indicative Of "Casing" Victim Or Location. ☐ Wearing Clothes/Disguise Commonly Used In Commission Of Crime.

☐ Actions Indicative Of Acting As A Lookout.

☐ Suspicious Behavior/Obtained (Describe)

☒ Other Reasonable Suspicion Of Criminal Activity (Specify) 444 observed throwing a firearm to street

Name Of Person Stopped Yacoubi, Yusef Nickname Yacoubi Date Of Birth 8/16/80

Address 450 Craven Ave Apt. No. 10 Tel. No.

Identification: ☐ Verbal ☒ Photo I.D. ☐ Refused

☐ Other (Specify)

Sex ☒ Male ☐ Female ☐ Race ☐ White ☐ Black ☐ Hispanic ☐ Black Hispanic ☐ Asian/Pacific Islander ☐ American Indian/Alaskan Native

Age 32 Height 6'3" Weight 260 Hair Black Eyes Blue Build Thick

Other (Scars, Tattoos, Etc.)

Did Officer Explain If No, Explain:

Person For Stop ☒ Yes ☐ No

Were Other Persons Stopped? ☐ Yes ☒ No If Yes, List Pct. Serial Nos.

Questioned/Frisked? ☐ Yes ☒ No

If Physical Force Was Used, Indicate Type:

☐ Hands On Suspect ☐ Drawing Firearm

☐ Suspect On Ground ☐ Baton

☐ Pointing Firearm At Suspect ☐ Pepper Spray

☐ Handcuffing Suspect ☐ Other (Describe)

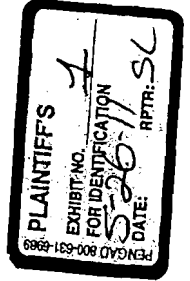
☒ Suspect Agitated With Car

Was Suspect Arrested? ☐ Yes ☒ No Offense 1088644354

Was Summons Issued? ☐ Yes ☒ No Offense 1088644354

Officer In Uniform? ☐ Yes ☒ No If No, How Identified? Shield ☐ I.D. Card

NYC 82



A1342

Was Person Frisked? ☐ Yes ☐ No IF YES, MUST CHECK AT LEAST ONE BOX

☐ Inappropriate Attire - Possibly Concealing Weapon ☒ Evasive Movements ☐ Refusal To Comply With Officer's Direction(s) Leading To Reasonable Fear For Safety

☐ Verbal Threats Of Violence By Suspect ☐ Actions Indicative Of Engaging In Violent Crimes ☐ Violent Crime Suspected

☐ Violent Behavior/Use Of Force/Use Of Weapon ☐ Suspicious Bulge/Object (Describe)

☒ Other Reasonable Suspicion of Weapons (Specify) *observed deft throw firearm*

Was Person Searched? ☒ Yes ☐ No IF YES, MUST CHECK AT LEAST ONE BOX ☐ Hard Object ☐ Admission Of Weapons Possession

☐ Outline Of Weapon ☐ Other Reasonable Suspicion of Weapons (Specify)

Was Weapon Found? ☒ Yes ☐ No If Yes, Describe *Pistol/Revolver* ☐ Rifle/Shotgun ☐ Assault Weapon ☐ Knife/Cutting Instrument

☐ Machine Gun ☐ Other (Describe)

Was Other Contraband Found? ☐ Yes ☒ No If Yes, Describe Contraband And Location

Demeanor Of Person After Being Stopped

Remarks Made By Person Stopped

Additional Circumstances/Factors: (Check All That Apply)

☐ Report From Victim/Witness ☐ Evasive, False Or Inconsistent Response To Officer's Questions

☒ Area Has High Incidence Of Reported Offense Of Type Under Investigation ☒ Changing Direction At Sight Of Officer/Flight

☒ Time Of Day, Day Of Week, Season Corresponding To Reports Of Criminal Activity ☐ Ongoing Investigations, e.g., Robbery Pattern

☐ Suspect Is Associating With Persons Known For Their Criminal Activity ☐ Sights And Sounds Of Criminal Activity, e.g., Bloodstains, Ringing Alarms

☐ Proximity To Crime Location

☐ Other (Describe)

Pct. Serial No. _____ Additional Reports Prepared: Complaint Rpt. No. _____ Juvenile Rpt. No. _____ Aided Rpt. No. _____ Other Rpt. (Specify) _____

REPORTED BY: Rank Name (Last, First, M.I.)

Print *PO Burbidge, Mike* Tact *936261* REVIEWED BY: Rank Name (Last, First, M.I.)

Signature *[Signature]* Command *187* Print *Sgt Biscardi* **NYC-8323560** Signature _____ Command *187*

A1343



PLAINTIFF'S EXHIBIT 16-IN EVIDENCE

Complaint Report
(pp. A1343-A1345)

REPRODUCED FOLLOWING

A1344



Case 1:10-cv-02714-JBW-VVP Document 24-1 Filed 09/09/11 Page 35 of 58 PageID #: 1692
Complaint # 2008-083-03562

	New York City Police Department OmniForm System - Complaints	
RECORD CONTAINS SEALED INFORMATION. THIS RECORD MAY NOT BE MADE AVAILABLE TO ANY PERSON OR PUBLIC OR PRIVATE AGENCY OUTSIDE THE POLICE DEPARTMENT.		
Report Cmd: 083	Jurisdiction: N.Y. POLICE DEPT	Record Status: Initial Arrests made
Occurrence NORTH EAST CORNER PARK STREET & Location: BROADWAY Name Of Premise: Premises Type: STREET Location Within Premise: PUBLIC SIDEWALK Visible By Patrol?: YES		Precinct: 083 Sector: F Beat: Post:
Occurrence From: 2008-05-15 00:42 THURSDAY Occurrence thru: 2008-05-15 00:45 Reported: 2008-05-15 01:28 Complaint Received: PICK-UP		Aided # Accident # O.C.C.B. #
SEALED		SEALED
Classification: CRIM POSS WEAPON Attempted/Completed: COMPLETED Most Serious Offense Is: FELONY PD Code: 792 WEAPONS POSSESSION 1 & 2 PL Section: 26503 Keycode: 118 DANGEROUS WEAPONS		Case Status: CLOSED Unit Referred To: Clearance Code: UNIFORM ARREST Log/Case #: 0 File #: Prints Requested? NO
Was The Victim's Personal Information Taken Or Possessed? NO	Was The Victim's Personal Information Used To Commit A Crime? NO	
Gang Related? NO	Gang Intel Log #:	Name Of Gang:
DIR Required? NO	Child In Common?	Child Abuse Suspected? NO
Intimate Relationship?		
SEALED		SEALED
If Burglary: Forced Entry? Structure: Entry Method: Entry Location:	Alarm: Bypassed? Comp Responded?: Company Name/Phone: Crime Prevention Survey Requested?:	If Arson: Structure: Occupied?: Damage by:
Supervisor On Scene - Rank / Name / Command :	Canvas Conducted: NO	Interpreter(if used):
NARRATIVE: AT T/IO ABOVE DEFT. WAS FOUND TO BE IN POSSESSION OF A LOADED FIREARM		
SEALED		SEALED
VICTIMS, REPORTERS, WITNESSES, SUSPECTS:		Complaint # 2008-083-03562

 PLAINTIFF'S
 EXHIBIT
 16

A1345

Case 1:10-cv-02714-JBW-WP Document 24-1 Filed 09/09/11 Page 36 of 58 PageID #: 1702
Complaint # 2008-083-03562

Name Sex Race Age															
VICTIM, PSNY															
SEALED															
SEALED															
ARRESTS:															
Complaint # 2008-083-03562															
<table border="1"> <tr> <th>Arrest ID</th> <th>Status</th> <th>Defendant Name</th> <th>Sex</th> <th>Race</th> <th>AGE</th> <th>Arrest Date</th> </tr> <tr> <td>K08644325</td> <td>SEALED</td> <td>MARSHALL, JOSHUA</td> <td>MALE</td> <td>HISPANIC</td> <td>WHITE</td> <td>27 05/15/2008</td> </tr> </table>		Arrest ID	Status	Defendant Name	Sex	Race	AGE	Arrest Date	K08644325	SEALED	MARSHALL, JOSHUA	MALE	HISPANIC	WHITE	27 05/15/2008
Arrest ID	Status	Defendant Name	Sex	Race	AGE	Arrest Date									
K08644325	SEALED	MARSHALL, JOSHUA	MALE	HISPANIC	WHITE	27 05/15/2008									
SEALED															
SEALED															
Reporting/Investigating M.O.S. Name: POM RANDALL SALIM	<table border="1"> <tr> <td>Tax #: 933231</td> <td>Command: PBBN AC</td> <td>Rep.Agency: NYPD</td> </tr> </table>	Tax #: 933231	Command: PBBN AC	Rep.Agency: NYPD											
Tax #: 933231	Command: PBBN AC	Rep.Agency: NYPD													
Supervisor Approving Name: SGT BISCARDI DOUGLA	<table border="1"> <tr> <td>Tax #: 923540</td> <td>Command: PBBN AC</td> <td>Rep.Agency: NYPD</td> </tr> </table>	Tax #: 923540	Command: PBBN AC	Rep.Agency: NYPD											
Tax #: 923540	Command: PBBN AC	Rep.Agency: NYPD													
Complaint Report Entered By: SGT BISCARDI	<table border="1"> <tr> <td>Tax #: 923560</td> <td>Command: PBBN AC</td> <td>Rep.Agency: NYPD</td> </tr> </table>	Tax #: 923560	Command: PBBN AC	Rep.Agency: NYPD											
Tax #: 923560	Command: PBBN AC	Rep.Agency: NYPD													
Signoff Supervisor Name: SGT VULTAGGIO	<table border="1"> <tr> <td>Tax #: 899966</td> <td>Command: 083 PCT</td> <td>Rep.Agency: NYPD</td> </tr> </table>	Tax #: 899966	Command: 083 PCT	Rep.Agency: NYPD											
Tax #: 899966	Command: 083 PCT	Rep.Agency: NYPD													
SEALED															
SEALED															
<div style="display: flex; justify-content: space-between; align-items: center;">  <div style="text-align: center;"> <h2>END OF COMPLAINT REPORT</h2> <h3># 2008-083-03562</h3> </div>  </div>															

A1346

PLAINTIFF'S EXHIBIT 17-IN EVIDENCE

Statement of Charges
(pp. A1346-A1347)

REPRODUCED FOLLOWING

A1347

Case 1:10-cv-02714-JBW-VVP Document 24-1 Filed 09/09/11 Page 49 of 58 PageID #: 183

CRIMINAL COURT OF THE CITY OF NEW YORK
PART APART COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK

STATE OF NEW YORK
COUNTY OF KINGS

V.

JOSHUA J MARSHALL

PARALEGAL INAMI MOORE OF THE KINGS COUNTY DISTRICT ATTORNEY'S OFFICE SAYS THAT ON OR ABOUT MAY 15, 2008 AT APPROXIMATELY 12:42 AM AT C/O PARK STREET & BROADWAY COUNTY OF KINGS, STATE OF NEW YORK,

THE DEFENDANT COMMITTED THE OFFENSE(S) OF:

PL 165.45(4)	CRIMINAL POSSESSION OF STOLEN PROPERTY IN THE FOURTH DEGREE
PL 165.01(2)	CRIMINAL POSSESSION OF A WEAPON IN THE FOURTH DEGREE
PL 165.03(2)	CRIMINAL POSSESSION OF A WEAPON IN THE SECOND DEGREE (DOO)

IN THAT THE DEFENDANT DID:

KNOWINGLY POSSESS STOLEN PROPERTY CONSISTING OF ONE OR MORE FIREARMS, RIFLES AND SHOTGUNS, AS SUCH TERMS ARE DEFINED IN PENAL LAW SECTION 165.00, WITH THE INTENT TO BENEFIT HIMSELF OR A PERSON OTHER THAN AN OWNER THEREOF OR TO IMPED THE RECOVERY BY AN OWNER THEREOF; POSSESS ANY FIREARM, ELECTRONIC DART GUN, ELECTRONIC STUN GUN, GRAVITY KNIFE, SWITCHBLADE KNIFE, PILUM BALLISTIC KNIFE, METAL KNUCKLE KNIFE, CANE SWORD, BILLY, BLACKJACK, BLUNTWOOD, METAL KNUCKLES, CHUKA STICK, SAMO BAO, SANDCLUB, WRIST-BRACE TYPE BLINDSHOT OR ELONGSHOT, SHINKEN OR KUMI FU STAR; POSSESS ANY LOADED FIREARM AND THAT SUCH POSSESSION DID NOT TAKE PLACE IN DEFENDANT'S HOME OR PLACE OF BUSINESS.

THE SOURCE OF DEFENDANT'S INFORMATION AND THE GROUNDS FOR DEFENDANT'S BELIEF ARE AS FOLLOWS:

THE DEFENDANT IS INFORMED BY POLICE OFFICER SALIM RANDALL, SHIELD NO. 15331, OF THE BROOKLYN NORTH ANTI CRIME UNIT THAT, AT THE ABOVE TIME AND PLACE, THE INFORMANT OBSERVED THE DEFENDANT IN POSSESSION OF A LOADED 38 CALIBER SMITH AND WESSON REVOLVER SERIAL NUMBER COK7317.

THE DEFENDANT IS INFORMED BY POLICE OFFICER MICHAEL BURKALDGE SHIELD NO. 15408, OF THE BROOKLYN NORTH ANTI CRIME UNIT THAT THE INFORMANT RECOVERED SAID 38 CALIBER SMITH AND WESSON REVOLVER FROM THE GROUND WHERE THE INFORMANT OBSERVED THE DEFENDANT THROW IT.

THE DEFENDANT IS INFORMED BY LIEUTENANT BORNH OF THE BROOKLYN NORTH ANTI CRIME UNIT THAT THE ABOVE MENTIONED FIREARM IS STOLEN IN THAT SAID WEAPON WAS REPORTED STOLEN BY DEBBIE WEIN IN SEMINOLE COUNTY, FLORIDA.

FALSE STATEMENTS MADE IN THIS DOCUMENT ARE PUNISHABLE AS A CLASS A MISDEMEANOR PURSUANT TO SECTION 210.45 OF THE PENAL LAW

S/Sgt. [Signature]
DATE SIGNATURE

5/15/2008 9:17:55 PM

NYC 18



A1348

PLAINTIFF'S EXHIBIT 18-IN EVIDENCE

Certificate of Disposition Dismissal
(pp. A1348-A1349)

REPRODUCED FOLLOWING

A1349

SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY
320 JAY STREET
BROOKLYN, NY 11201

FEE:\$10.00

CERTIFICATE OF DISPOSITION DISMISSAL

DATE: 04/28/2010

CERTIFICATE OF DISPOSITION NUMBER: 25013

PEOPLE OF THE STATE OF NEW YORK
VS.

CASE NUMBER: 04931-2008
LOWER COURT NUMBER(S): 2008KN036548
DATE OF ARREST: 05/15/2008
ARREST #: K08644325
DATE OF BIRTH: 07/06/1980
DATE FILED: 06/10/2008

MARSHALL, JOSHUA J

DEFENDANT

I HEREBY CERTIFY THAT IT APPEARS FROM AN EXAMINATION OF THE RECORDS ON FILE IN THIS OFFICE THAT ON 05/27/2009 THE ABOVE ACTION WAS DISMISSED AND ALL PENDING CRIMINAL CHARGES RELATED TO THIS ACTION WERE ALSO DISMISSED BY THE HONORABLE GARY, M THEN A JUDGE OF THIS COURT.

THE DEFENDANT WAS DISCHARGED FROM THE JURISDICTION OF THE COURT.

THE ABOVE MENTIONED DISMISSAL IS A TERMINATION OF THE CRIMINAL ACTION IN FAVOR OF THE ACCUSED AND PURSUANT TO SECTION 160.60 OF THE CRIMINAL PROCEDURE LAW "THE ARREST AND PROSECUTION SHALL BE DEEMED A NULLITY AND THE ACCUSED SHALL BE RESTORED, IN CONTEMPLATION OF LAW, TO THE STATUS OCCUPIED BEFORE THE ARREST AND PROSECUTION".

PURSUANT TO SECTION 160.50(1C) OF THE CRIMINAL PROCEDURE LAW, ALL OFFICIAL RECORDS AND PAPERS RELATING TO THIS CASE ARE SEALED.

IN WITNESS WHEREOF, I HAVE HEREBY SET MY HAND AND AFFIXED MY OFFICIAL SEAL ON THIS DATE 04/28/2010.

Nancy T. Sunshine

COURT CLERK

NANCY T. SUNSHINE
Kings County Clerk



A1350

DEFENDANTS' EXHIBIT E

Photograph
(pp. A1350-A1351)

REPRODUCED FOLLOWING

A 1351



A1352

DEFENDANTS' EXHIBIT G

Photograph
(pp. A1352-A1353)

REPRODUCED FOLLOWING

A 1353



A1354

COURT'S EXHIBIT 1

Criminalist's Report (Entered April 24, 2012)
(pp. A1354-A1356)

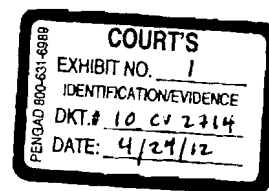
REPRODUCED FOLLOWING

A 1355



NYC
Office of Chief
Medical Examiner

421 East 26th Street, New York, NY 10016
Telephone: 212.323.1903 Fax: 212.323.1920



My name is Nana Lamou  -Smith.

I am employed as a Criminalist IV at the Office of Chief Medical Examiner, Department of Forensic Biology.

I have been employed at the Office of Chief Medical Examiner since September 2004.

Prior to joining the Office of Chief Medical Examiner, I was employed for 2½ years as a forensic DNA examiner at BRT Laboratories, a private forensic laboratory in Baltimore, Maryland.

Prior to BRT, I was employed for 1½ years as a forensic DNA analyst at The Bode Technology Group, a private forensic laboratory in Springfield, Virginia.

I have a Bachelor of Arts (major: Biology) from Vassar College, and a Masters of Science (Forensic Science) from the University of Illinois at Chicago.

Over the course of my career as a forensic DNA analyst, I have personally performed thousands of DNA tests, analyses and review.

Over the course of my career, I have personally supervised thousands of DNA tests, analyses and review.

I have been qualified as an expert witness in Forensic Biology and DNA analysis in all five boroughs in New York City, as well as Federal Court, Southern District of New York, and Baltimore City Criminal Court.

To the best of my knowledge, I have testified approximately 50 times in Grand Jury and trial. I have testified as to the results of DNA analysis on homicides, sexual assaults, property crimes and weapons cases. At the Office of Chief Medical Examiner, testifying in court as to the results of DNA testing and analysis are a core job requirement. My testimony in grand jury and trial is a function of the work I perform and supervise. Accordingly, I have never been paid for such testimony. I have also never testified at a civil or criminal deposition.

I do not have an existing list of all cases on which I have testified in the Grand Jury and trial – nor am I able to create such a list, going back to 2002, from memory. The Office of Chief Medical Examiner does not require any employee within the Department of Forensic Biology to keep such a list.

The Office of Chief Medical Examiner is an independent subdivision of the New York City Department of Health and Mental Hygiene. The Agency's Department of Forensic Biology is the City's public forensic DNA laboratory.

A 1356

4

At the Office of Chief Medical Examiner, I am a Supervisor in the group within the Department of Forensic Biology which performs evidence examination and DNA testing on all Criminal Possession of Weapons cases.

The Office of Chief Medical Examiner began testing swabs collected from firearms in the beginning of 2008.

On May 23, 2008, the Department of Forensic Biology received New York City Police Department voucher P200208, in association with NYPD complaint no. 2008-083-03562, which contained the following four items (each collected from "Smith & Wesson .38 cal firearm serial #CDK7342"): swab of backstrap and grips, swab of trigger, swab of cylinder release and swab of ejector rod.

DNA extraction was performed on these four items (again, swab of backstrap and grips, swab of trigger, swab of cylinder release and swab of ejector rod). An insufficient amount of DNA was detected. Therefore, no further DNA testing could be done.

These results and the supporting data are contained in the associated Forensic Biology case file FB08-03040.

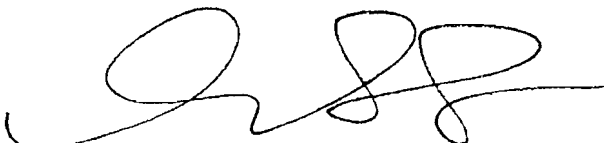
I have reviewed Forensic Biology case file FB08-03040 in preparation for my testimony.

The amount of DNA detected within the Forensic Biology laboratory is entirely dependent on the amount of biological material (e.g., blood, semen, saliva, skin cells) deposited on the item. So for example, with a firearm the ability to detect a sufficient amount of DNA is dependent on how long the item was handled (i.e., seconds or minutes or repeatedly) and the manner in which it was handled (i.e., if the item was handled with bare hands or gloves).

In my experience at the Office of Chief Medical Examiner, swabs of firearms submitted for DNA analysis often yield an insufficient amount of DNA and therefore no further DNA testing can be done.

There may be many factors which can contribute to DNA not being detected on an item of evidence. Based on my experience and training, these factors include extreme heat or extreme cold, evidence being exposed to a wet or damp environment, how the item was handled, and if the item was handled at all.

In my opinion, there are innumerable hypotheses which can contribute to the finding of insufficient DNA. If I am asked, I can hypothesize, based upon my experience and training, as to why the results in this case generated an insufficient amount of DNA.

A handwritten signature in black ink, appearing to read 'Nana Lamou  -Smith', with a stylized, cursive script.

Nana Lamou  -Smith
Criminalist IV

A1357

COURT'S EXHIBIT 1

Defendants' Brief (Entered April 25, 2012)
(pp. A1357-A1381)

REPRODUCED FOLLOWING

A 1358

Case 1:10-cv-02714-JBW-VVP Document 69 Filed 04/25/12 Page 1 of 11 PageID #: 1044

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

JOSHUA MARSHALL,

Plaintiff,

-against-

P.O. SALIM RANDALL, Shield No. 15331,
Individually and in His Official Capacity, P.O.
MICHAEL BURBRIDGE, Shield No. 15488,
Individually and in His Official Capacity,

10 Civ. 2714 (JBW)(VVP)

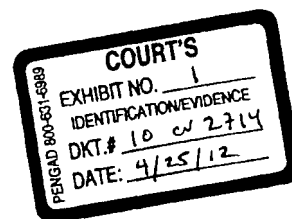
Defendants.

-----X

**DEFENDANTS' BRIEF IN SUPPORT
OF MULTIPLE TRIAL MOTIONS**

FELICIA GROSS
JOHANA CASTRO
MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
100 Church Street
New York, New York 10007
(212) 788-0303
fgross@law.nyc.gov
jcastro@law.nyc.gov

Attorneys for Defendants



A 1359

Case 1:10-cv-02714-JBW-VVP Document 69 Filed 04/25/12 Page 2 of 11 PageID #: 1045

PRELIMINARY STATEMENT

Trial commenced in this matter on April 23, 2012 before the Honorable Jack B. Weinstein, United States District Judge. Defendants have made several motions during the course of trial, which the Court has either denied or reserved ruling on pending briefing by defendants.

Defendants respectfully submit this memorandum of law in support of their several motions seeking the following relief: (1) defendants should be permitted to cross-examine plaintiff as to his criminal history now that plaintiff has opened the door to such testimony; (2) plaintiff has improperly made an issue of the legal validity of the officers' initial approach in contravention of the court's prior order; defendants request a curative instruction, and, in the alternative, a mistrial; (3) defendants should be permitted to cross-examine plaintiff as to his emotional and psychological injuries stemming from his incarceration; (4) defendants should be permitted to mention in closing that the criminal case against plaintiff was dismissed on speedy trial grounds; (5) defendants request a curative instruction as to the import of the grand jury's indictment; (6) defendants request a jury instruction that the grand jury indictment creates a presumption of probable cause; and (7) defendants move to dismiss the malicious prosecution and fair trial claims in light of the U.S. Supreme Court's recent decision in *Rehberg*.

POINT I

PLAINTIFF HAS OPENED THE DOOR TO HIS CRIMINAL HISTORY; DEFENDANTS SHOULD BE PERMITTED TO CROSS-EXAMINE HIM AS TO THAT HISTORY.

Defendants previously moved *in limine* to be permitted to cross examine plaintiff as to his extensive criminal history, which includes two prior felony convictions. Those felonies are

A 1360

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determine damages; it would be based on pure speculation. At the very least, they will have the false impression that he has never spent time in jail.

POINT II

PLAINTIFF HAS IMPROPERLY RAISED THE ISSUE OF DEFENDANTS' INITIAL DECISION TO APPROACH PLAINTIFF; BY SO DOING, HE HAS OPENED THE DOOR TO BURBRIDGE'S TESTIMONY REGARDING HIS RECOGNITION OF PLAINTIFF; AT THE VERY LEAST, DEFENDANTS REQUEST A CURATIVE INSTRUCTION; DEFENDANTS REQUEST A MISTRIAL IF THE COURT DECLINES TO GIVE THE JURY A CURATIVE INSTRUCTION AS WELL AS A RULING THAT PLAINTIFF IS PRECLUDED FROM IMPUGNING THE LEGAL VALIDITY OF THE INITIAL APPROACH IN CLOSING.

?

e 45

Defendants previously moved *in limine* to be permitted to elicit testimony from Officer Burbridge that one factor in his decision to approach plaintiff on May 15, 2008 was that he recognized plaintiff from a police database. The Court denied that motion for two reasons: (1) it noted that the "initial stop" (or initial approach) was not at issue in this case; and (2) the admission of such testimony would constitute reversible error under the Second Circuit's recent decision in *United States v. Scott*, No. 10-3972-cr (2d Cir. Apr. 6, 2012).

First, the legal validity of the initial approach is simply not at issue in this case. The Court so ruled on April 16, 2012. Since the court's initial ruling, plaintiff's counsel has argued *repeatedly* that defendants acted improperly in their initial approach of plaintiff. (Trial Transcript Unavailable, 4/24). For example, Officer Burbridge was repeatedly questioned as to the reasons for his initial approach:

Q: Prior to the time that you decided to stop Mr. Marshall, had you observed suspicious movements?

A: Yes.

A 1361

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Q: Referring to your deposition on Page 66, Line 23,
"QUESTION: Did you observe any furtive movements by Joshua
Marshall before you decided to stop him?"
"ANSWER: No."

MS. CASTRO: Objection. I also note there's an
objection at the deposition to that question also.
THE COURT: Overruled.

BY MR. NORINSBERG

Q: Do you recall being asked that question and giving that
answer?
A: Yes.
Q: You remember that?
A: Yes.
Q: So according to your deposition testimony, you did not
observe any suspicious movements by Mr. Marshall before you
decided to stop him; true or not true?

MS. CASTRO: Objection.
THE COURT: Overruled.
MS. CASTRO: Your Honor, this pertains to your
Honor's in limine rulings.
THE COURT: The reference is to the night from the
time of first observation to the time of arrest; is that
correct?
MR. NORINSBERG: Yes.
MS. CASTRO: Your Honor, may we be heard at sidebar?
THE COURT: You may not.
MS. CASTRO: Your Honor, I just note my objection
that counsel's question --
THE COURT: Your objection is always noted. We have
a full-time reporter. Proceed with the questioning.

Ex. C, Trial Transcript, Testimony of Michael Burbridge, April 24, 2012 at 124, ll. 6-25; at 125,
ll. 1-14.

As a result of plaintiff's improperly making an issue of the initial approach,
defendants request that the Court give the jury the following curative instruction: "Ladies and
Gentlemen, there is no issue in this case as to whether the officers were permitted to approach
and question plaintiff as he walked down the street on May 15, 2008. The only issue you have to
decide is whether they had a lawful basis to arrest him for possession of a weapon."

*This is on
credibility &
aw
committing
misleading con-
siderations*

A 1362

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Next, defendants renew their request that Officer Burbridge be permitted to testify that one factor in his decision to approach plaintiff was the fact that he recognized plaintiff from a police database. By its ruling, the Court is preventing him from testifying truthfully. Moreover, plaintiff has opened the door to this line of testimony by repeatedly questioning Officer Burbridge as to the reasons for his initial approach. Finally, the Second Circuit's ruling in *Scott* is simply not analogous here. In the *Scott* case, the Second Circuit ruled in the context of a criminal case that testimony by an officer regarding recognition from a prior encounter was too prejudicial. That case is distinguishable on two grounds: (1) it was a criminal case where the liberty of defendant was at stake, and thus the probative/prejudicial balancing test is different; and (2) the initial approach and/or stop was, in fact, at issue in that case. It is not here. This is a civil action for monetary damages. Defendants submit that the Court is allowing plaintiff to use its *in limine* ruling as both a sword and a shield.

Finally, defendants should be precluded from impugning or otherwise questioning the legal validity of the initial approach during their closing. The Court ruled that it is not at issue in the case, and plaintiff's have completely failed to abide by that ruling. ✓

POINT III**DEFENDANTS SHOULD BE PERMITTED TO CROSS EXAMINE PLAINTIFF AS TO HIS CLAIM OF EMOTIONAL DAMAGES STEMMING FROM HIS INCARCERATION.**

During plaintiff's direct examination, he testified that his stay on Rikers Island was unpleasant, depressing, and that he encountered unsavory individuals, at least one of whom had tuberculosis. He testified as follows:

- Q: Can you just describe a little bit for the jury what the conditions were like when you were in jail.
- A: I mean, you're surrounded about everything. You know, you have people with tuberculosis. You got people who just

A 1363

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don't shower.

Ex. A, Trial Transcript, Testimony of Joshua Marshall, April 24, 2012 at 27, ll. 9-18.

However, plaintiff has abandoned his claim for emotional damages in this case.

Specifically, during his deposition, plaintiff gave the following testimony:

Q: Are you seeking to recover for any emotional or psychological injuries?

A: *No, no.*

Ex. B, Marshall Deposition at 173, ll. 9-11 (emphasis added).

Defendants attempted to cross-examine plaintiff regarding his abandonment of that claim, but the objection to such cross-examination was sustained. Defendants request that they be allowed to cross-examine plaintiff as to his abandonment of the emotional damages claim. Allowing plaintiff to testify as to emotional damages, while precluding defendants from cross-examining as to his abandonment of that claim is highly prejudicial. Moreover, plaintiff's testimony about the conditions on Rikers Island creates the impression that he has never been there before, which is clearly not the case given his numerous other arrests and incarcerations. Thus, it goes to his credibility.

POINT IV

DEFENDANTS SHOULD BE PERMITTED TO MENTION IN CLOSING THE FACT THAT PLAINTIFF'S CASE WAS DISMISSED ON SPEEDY TRIAL GROUNDS.

Defendants should be permitted to mention in closing that plaintiff's criminal case was dismissed on speedy trial grounds. Defendants do not dispute that dismissal on speedy trial grounds is a "favorable determination" for purposes of a malicious prosecution claim. That is not at issue. However, defendants should be able to inform the jury of the reason for the dismissal – the simple fact that it was dismissed on speedy trial grounds. This is one of the facts of this case

A 1364

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and the jury should be allowed to know the basis for the dismissal. Defendants do not intend to characterize a speedy trial dismissal as a “technicality.” They simply intend to inform the jury that the case was dismissed. It did not go to trial. It was not “thrown out” by a judge. The factual statement – that the case was dismissed on speedy trial grounds – is not prejudicial to the plaintiff. However, the bald statement that the case was “dismissed,” without more, is prejudicial to the defendants.

The case cited by plaintiff in support of his contention that the jury should not be so informed, *Cantalino v. Danner*, 754 N.E.2d 164, 168 (N.Y. 2001), simply does not speak to the issue. It merely holds that for purposes of malicious prosecution, a speedy trial dismissal is considered a “favorable determination.” This is not in dispute. Nor does the case preclude defendants from informing the jury of the factual reason for the dismissal of the case.

POINT V

**DEFENDANTS REQUEST A CURATIVE
INSTRUCTION REGARDING THE IMPORT
OF THE GRAND JURY INDICTMENT.**

During plaintiff’s cross-examination, the Court instructed the jury that “Just because the grand jury indicted does not mean that the plaintiff was guilty.” The obverse is also true. Defendants request an instruction that “Just because the case was dismissed does not mean that the plaintiff didn’t have the gun.” As it stands, the Court’s instruction is not even-handed. In its partial form, it is incorrect and highly prejudicial to the defendants.

POINT VI

**DEFENDANTS REQUEST A JURY
INSTRUCTION THAT THE GRAND JURY’S
INDICTMENT CREATES A PRESUMPTION
OF PROBABLE CAUSE.**

A 1365

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Defendants renew their request for a jury instruction that the grand jury's indictment creates a presumption of probable cause. *See Savino v. City of New York*, 331 F.3d 63, 72 (2d Cir. 2003) (indictment by a grand jury creates a presumption of probable cause). To overcome that presumption plaintiff must produce evidence "that the indictment was procured by fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith." *Alvarado v. City of New York*, 2011 U.S. App. LEXIS 25110 (2d Cir. N.Y. Dec. 19, 2011).

The Court previously rejected defendants' request because the Court reasoned, plaintiff's theory of the case is that the indictment was procured by fraud. Defendants agree that is plaintiff's theory of the case. But that doesn't change the law as to presumptions. The presumption has two parts: a presumption, and criteria by which the presumption may be rebutted. Here, the Court has, in effect, skipped to the second step.

Defendants submit that the failure to give the requested instruction is reversible error. *See Rothstein v. Carriere*, 373 F.3d 275, 285 (2d Cir. 2004) ("[i]n sum, the district court's erroneous disregard of the presumption that probable cause supported the prosecution of [plaintiff] requires a reversal of the judgment in his favor.")

POINT VI

**DEFENDANTS MOVE TO DISMISS BOTH
THE MALICIOUS PROSECUTION CLAIM
AND THE FAIR TRIAL CLAIM IN LIGHT OF
THE U.S. SUPREME COURT'S DECISION IN
REHBERG.**



Defendants move to dismiss plaintiff's malicious prosecution and fair trial claims in light of the Supreme Court's recent decision in *Rehberg v. Paulk*, 2012 U.S. LEXIS 2711 (Apr. 2, 2012), barring any §1983 action wherein plaintiff's civil rights claims are premised on allegations stemming from grand jury testimony. In that case, the Supreme Court held that jury witnesses are entitled to absolute immunity from "any § 1983 claim based on the witness'

A 1366

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testimony.” *Rehberg v. Paulk*, 2012 U.S. LEXIS 2711 at *23-24 (emphasis added). The Supreme Court went on to underscore the importance of this holding cautioning that “this rule may not be circumvented by claiming that a grand jury witness conspired to present false testimony or by using evidence of the witness’ testimony to support any other § 1983 claim concerning the initiation or maintenance of a prosecution.” *Id.* at *24. The reasoning behind granting absolute immunity for grand jury witnesses is the same logic previously used to grant absolute immunity for trial witnesses. *Id.* at *20-21. The main concern is that the grand jury may be deprived of critical evidence and the truth-seeking function of the tribunal weakened, as a result of a witness’ fear of retaliatory litigation. *Id.* Additionally, the potential of civil liability is not necessary to prevent false testimony, as there are other sanctions in place, such as prosecution for perjury, which provides a sufficient deterrent. *Id.* at *21.

In addition to granting a witness absolute immunity for grand jury testimony, importantly, *Rehberg* also states that a law enforcement officer does not initiate a prosecution, a necessary factor of the malicious prosecution standard, by testifying before a grand jury. *Rehberg*, 2012 U.S. LEXIS 2711 at *27 - *28. The Supreme Court stated “[b]y testifying before a grand jury, a law enforcement officer does not perform the function of applying for an arrest warrant; nor does such an officer make the critical decision to initiate a prosecution ... such a witness, unlike a complaining witness at common law, does not make the decision to press criminal charges.” *Id.* at *27. Indeed, the Court recognized the inherent unfairness in allowing a testifying officer to be civilly liable for a malicious prosecution action, yet insulate a prosecutor who in fact initiates and actively prosecutes a matter. *Id.* at *28 (“it is almost always a prosecutor who is responsible for the decision to present a case to a grand jury ... [i]t would thus be anomalous to permit a police officer who testifies before a grand jury to be sued for maliciously procuring an unjust prosecution when it is the prosecutor, who is shielded by

A 1367

Case 1:10-cv-02714-JBW-VVP Document 69 Filed 04/25/12 Page 11 of 11 PageID #: 1054

absolute immunity, who is actually responsible for the decision to prosecute.”). The Court went on to hold that this rule cannot be circumvented by claiming that a grand jury witness conspired to present false testimony. *Id.* at *24.

Accordingly, any purported claims against the defendant officers must be dismissed because they did not initiate the underlying prosecution.

Moreover, in light of *Rehberg*, to the extent plaintiff's denial of fair trial claim is based upon the alleged false testimony of the defendant officers before the grand jury, any such claim must now be dismissed as a matter of law.

CONCLUSION

For the foregoing reasons, defendants Police Officers Salim Randall and Michael Burbridge respectfully request that the Court grant their motions in their entirety and for such other and further relief as the Court deems just and proper.

Dated: New York, New York
April 25, 2012

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Corporation Counsel of the City of New York
Attorney for Defendants Police Officers Salim
Randall and Michael Burbridge
100 Church Street
New York, New York 10007
(212) 788-0303

By: /s/ Felicia Gross
 Assistant Corporation Counsel
 Special Federal Litigation Division

By: /s/ Johana V. Castro
 Senior Counsel
 Special Federal Litigation Division

A 1368

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EXHIBIT A

A 1369

Case 1:10-cv-02714-JBW-VVP Document 70 Filed 04/25/12 Page 2 of 14 PageID #: 1056

1

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 JOSHUA MARSHALL,
4 Plaintiff,

5 versus 10-CV-02714

6 THE CITY OF NEW YORK,
7 Defendant. United States Courthouse
8 Brooklyn, New York

9 April 23, 2012
10 9:30 A.M.

11 EXCERPT OF TRANSCRIPT OF TRIAL
12 TESTIMONY OF JOSHUA MARSHALL
13 Before: HON. JACK B. WEINSTEIN,
14 UNITED STATES DISTRICT JUDGE

15 A P P E A R A N C E S:

16 FOR THE PLAINTIFF:

17 COHEN & FITCH, LLP
18 Attorneys for the Plaintiff
19 Woolworth Building
20 233 Broadway - Suite 1800
21 New York, New York 10279

22 BY: GERALD M. COHEN, ESQ.
23 JON NORINSBERG, ESQ.

24 For the Defendants:

25 NEW YORK CITY LAW DEPARTMENT
Attorney for the Defendant
100 Church Street
New York, New York 10007

BY: FELICIA GROSS, ESQ.
JOHANA CASTRO, ESQ.
FRANCES SANDS, ESQ.

A 1370

Case 1:10-cv-02714-JBW-VVP Document 70 Filed 04/25/12 Page 3 of 14 PageID #: 1057

DIRECT - J. MARSHALL

24

1 would be a situation where I would be able to present my case
2 to -- among peers. And it was an opportunity, and I should go
3 for it.

4 Q Now, was your attorney present when you testified in the
5 grand jury?

6 A Yes.

7 Q And was your attorney allowed to ask you any questions
8 while this case was presented to the grand jury?

9 MS. GROSS: Objection.

10 THE COURT: Overruled.

11 THE WITNESS: No.

12 BY MR. COHEN

13 Q Who was the only person questioning you in the grand
14 jury?

15 A The district attorney.

16 Q Now, Mr. Marshall, had you ever testified in a grand jury
17 before this incident?

18 A No.

19 MS. GROSS: Objection, your Honor. Objection.

20 THE COURT: Overruled.

21 BY MR. COHEN

22 Q How did that make you feel, Mr. Marshall?

23 A What, speaking in front of a grand jury?

24 Q Yeah.

25 A Well, I've never been in a position like that before, so

A 1371

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DIRECT - J. MARSHALL

25

1 I was very nervous. Never been bombarded with questions, so I
2 didn't really know how to handle the situation. I was thrown
3 off by the whole arrest situation, me being incarcerated. So
4 it was just so much coming at me at one time. But I still
5 gave it a shot, man. You know, I was looking for a good
6 outcome.

7 Q Did you get a good outcome?

8 A No.

9 Q What happened, Mr. Marshall?

10 A I was indicted.

11 Q What happened after you were indicted? Where did you go?

12 A Right back to Rikers Island.

13 Q At that point, what was your understanding of where your
14 criminal case was going?

15 A Trial.

16 Q Why did you know the case was going to trial?

17 A Because I was not giving a guilty plea.

18 Q Can you tell the members of the jury why you weren't
19 going to plead guilty in this case.

20 A Because I was going to plead my innocence to the end.

21 Q Now, without telling the jury, again, what was said, did
22 you have discussions with your attorney about the risks of
23 taking a case like this to trial?

24 A Yes.

25 Q What was your understanding of the risks of fighting a

A 1372

Case 1:10-cv-02714-JBW-VVP Document 70 Filed 04/25/12 Page 5 of 14 PageID #: 1059

DIRECT - J. MARSHALL

27

1 Q Did there come a time when you were actually finally
2 released from jail with respect to these charges?

3 A Yes.

4 Q When were you released from jail?

5 A The end of September. I don't know the exact date.

6 Q So approximately how long were you in jail in connection
7 with these charges?

8 A Four and a half months.

9 Q Can you just describe a little bit for the jury what the
10 conditions were like when you were in jail.

11 A I mean, you're surrounded about everything. You know,
12 you have people with tuberculosis. You got people who just
13 don't shower. You know --

14 MS. GROSS: Objection, your Honor.

15 THE WITNESS: -- the eating situation is horrible.

16 THE COURT: I'll allow it briefly.

17 THE WITNESS: It was just depressing. It was very
18 depressing, very overwhelming. Yeah, very disturbing.

19 BY MR. COHEN

20 Q Now, after you were released from jail, were you still
21 required to come back to court with respect to these charges?

22 A Yes.

23 Q How many times did you have to come back to court?

24 A Approximately eight times.

25 Q How long was this case pending after you were released

A 1373

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EXHIBIT B

A 1374

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COPY

1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSHUA MARSHALL,

Plaintiff,

-against-

THE CITY OF NEW YORK, Et. Al,

Defendants.

EXAMINATION BEFORE TRIAL

Of the Plaintiff, JOSHUA MARSHALL, held
on Tuesday, April 26, 2011, commencing at
10:26 a.m., at Sing Sing Correctional
Facility, 354 Hunter Road, Ossining, New
York, before Amelia Moller, a Shorthand
Reporter and a Notary Public in and for
the State of New York.

A 1375

Case 1:10-cv-02714-JBW-VVP Document 70 Filed 04/25/12 Page 8 of 14 PageID #: 1062

JOSHUA MARSHALL 10R3164

173

- 1 Q. That was legal aide?
- 2 A. At that moment, yes.
- 3 Q. So basically the money for the bail and
- 4 the lost wages, correct?
- 5 A. Yes.
- 6 Q. Are you seeking to recover for any
- 7 physical injuries?
- 8 A. No.
- 9 Q. Are you seeking to recover for any
- 10 emotional or psychological injuries?
- 11 A. No, no.
- 12 Q. Are you seeking to recover for any damage
- 13 to your reputation that might have
- 14 resulted from this arrest?
- 15 A. No.
- 16 Q. So, it would be for the economic damage
- 17 and the loss of your liberty the fact
- 18 that you were incarcerated, correct?
- 19 A. Correct.
- 20 Q. Okay. Have you ever been incarcerated on
- 21 other occasions other than as a result of
- 22 this incident here and the second
- 23 incident that happened in May of 2009?
- 24 A. Have I ever been incarcerated before
- 25 other than these two incidents?

A 1376

Case 1:10-cv-02714-JBW-VVP Document 70 Filed 04/25/12 Page 9 of 14 PageID #: 1063

EXHIBIT C

A 1377

Case 1:10-cv-02714-JBW-VVP Document 70 Filed 04/25/12 Page 10 of 14 PageID #: 1064

1

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 -----X
4 JOSHUA MARSHALL,
5 Plaintiff,

6 versus

10-CV-02714 (JBW)

7 THE CITY OF NEW YORK,
8 Defendant. United States Courthouse
9 Brooklyn, New York
10 -----X

11 April 23, 2012
12 9:30 A.M.

13 TRANSCRIPT OF TRIAL
14 Before: HON. JACK B. WEINSTEIN,
15 UNITED STATES DISTRICT JUDGE

16 APPEARANCES:

17 FOR THE PLAINTIFF:

18 COHEN & FITCH, LLP
19 Attorneys for the Plaintiff
20 Woolworth Building
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22 New York, New York 10279

23 BY: GERALD M. COHEN, ESQ.
24 JON NORINSBERG, ESQ.

25 For the Defendants:

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BY: FELICIA GROSS, ESQ.
JOHANA CASTRO, ESQ.
FRANCES SANDS, ESQ.

A 1378

Case 1:10-cv-02714-JBW-VVP Document 70 Filed 04/25/12 Page 11 of 14 PageID #: 1065

DIRECT - OFFICER BURBRIDGE

123

1 right?

2 A Yes, I did.

3 Q And then shortly after you saw Mr. Marshall, you made a
4 decision to stop these two; is that correct?

5 A Yes.

6 Q And would you agree, Officer Burbridge, that it was only
7 a matter of seconds from the time you first saw Mr. Marshall
8 until the time you stopped him?

9 A Yes.

10 Q Now, you're familiar about what's known as furtive
11 movements, right?

12 A That's correct.

13 Q Furtive movements would be something of a suspicious
14 movement, right?

15 A That's correct.

16 Q Furtive movements would be an evasive movement, right?

17 A That's correct.

18 Q Can you please tell the members of this jury, did you
19 observe any furtive movements by Mr. Marshall before you
20 decided to stop him?

21 MS. CASTRO: Objection. Your Honor, the stop is not
22 in question. Further, counsel is diving into questions that
23 are inappropriate.

24 THE COURT: You may continue. Overruled.

25 THE WITNESS: I'm sorry, could you restate that.

A 1379

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DIRECT - OFFICER BURBRIDGE

124

1 BY MR. NORINSBERG

2 Q Prior to the time that you saw Mr. Marshall, did you
3 observe any furtive movements before you decided to stop him?

4 A Can you rephrase it.

5 MR. NORINSBERG: Strike it.

6 BY MR. NORINSBERG

7 Q Prior to the time that you decided to stop Mr. Marshall,
8 had you observed suspicious movements?

9 A Yes.

10 Q Referring to your deposition on Page 66, Line 23,
11 "QUESTION: Did you observe any furtive movements by Joshua
12 Marshall before you decided to stop him?

13 "ANSWER: No."

14 MS. CASTRO: Objection. I also note there's an
15 objection at the deposition to that question also.

16 THE COURT: Overruled.

17 BY MR. NORINSBERG

18 Q Do you recall being asked that question and giving that
19 answer?

20 A Yes.

21 Q You remember that?

22 A Yes.

23 Q So according to your deposition testimony, you did not
24 observe any suspicious movements by Mr. Marshall before you
25 decided to stop him; true or not true?

A 1380

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DIRECT - OFFICER BURBRIDGE

125

1 MS. CASTRO: Objection.

2 THE COURT: Overruled.

3 MS. CASTRO: Your Honor, this pertains to your
4 Honor's in limine rulings.

5 THE COURT: The reference is to the night from the
6 time of first observation to the time of arrest; is that
7 correct?

8 MR. NORINSBERG: Yes.

9 MS. CASTRO: Your Honor, may we be heard at sidebar?

10 THE COURT: You may not.

11 MS. CASTRO: Your Honor, I just note my objection
12 that counsel's question --

13 THE COURT: Your objection is always noted. We have
14 a full-time reporter. Proceed with the questioning.

15 BY MR. NORINSBERG

16 Q Now, before you decided to stop Mr. Marshall, you hadn't
17 activated your sirens at that point, correct?

18 A That's correct.

19 Q You hadn't activated your flashing lights, correct?

20 A That's correct.

21 Q You hadn't yelled out, "Stop, police," or words to that
22 effect; is that right?

23 A That's correct.

24 Q You hadn't made any effort to stop these two individuals;
25 is that correct?

A 1381

Case 1:10-cv-02714-JBW-VVP Document 70 Filed 04/25/12 Page 14 of 14 PageID #: 1068

DIRECT - OFFICER BURBRIDGE

126

1 A That's correct.

2 Q Did you see Mr. Marshall's eyes bulging as he was walking
3 down the street?

4 A I don't remember them bulging.

5 Q Did you see him suddenly stop in his tracks and look
6 scared when he saw your police car?

7 A Yes.

8 Q You saw that, right?

9 A Yes, I did.

10 Q Even though you said in your deposition you didn't
11 observe anything suspicious, right?

12 MS. CASTRO: Objection.

13 BY MR. NORINSBERG

14 Q Now, after you saw Mr. Marshall, the police vehicle made
15 a right onto Park Street, isn't that true?

16 A That's true.

17 Q So you were here just a few moments before when Officer
18 Randall was giving his testimony, correct?

19 A That's correct.

20 Q And you saw Officer Randall explain to the jury where
21 things were on that photograph, correct?

22 A That's correct.

23 Q And you saw Officer Randall say that the police vehicle
24 actually was coming from the other side of Broadway and made a
25 left onto Park Street, true?

A1382

COURT'S EXHIBIT 1

Defendants' Motion for a Mistrial (Entered April 26, 2012)
(pp. A1382-A1405)

REPRODUCED FOLLOWING

A 1383

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x

JOSHUA MARSHALL,

Plaintiff,

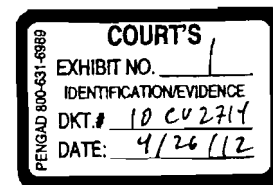
-against-

P.O. SALIM RANDALL, and P.O. MICHAEL
BURBRIDGE,

10 Civ. 2714 (JBW)(VVP)

Defendants.

-----x



DEFENDANTS' MOTION FOR A MISTRIAL AND
MEMORANDUM OF LAW IN SUPPORT THEREOF

FELICIA GROSS
JOHANA CASTRO
MICHAEL A. CARDOZO
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During its charge conference, the Court properly instructed the jury that: "If you award compensatory damages, you may award additional punitive damages if you find that a defendant engaged in extraordinary misconduct." Jury Instructions, Section IV, Part B (April 24, 2012, 4:51 PM Version). After giving such instruction, the jury submitted a note containing the following question, in sum or in substance: "Can we award punitive damages without first awarding compensatory damages? Section IV.B." The Court correctly informed them the answer was no. However, after conducting further research, the Court assembled the jury and gave them the following supplemental jury charge:

THE COURT: Assuming you find liability -- and I'm not saying you should or shouldn't, do you understand? If you find liability, and flowing from that liability as a proximate cause was deprivation of the Plaintiff's liberty, either while he was arrested in violation of his rights -- if you find that -- or for another reason in violation of his rights, he was incarcerated for a substantial length of time, then he is entitled to compensatory damages. Do you understand that?

(Jury nodding.)

THE COURT: How much is for you to decide. So the question, "Can we give punitive awards without giving compensatory," theoretically, you can. *You can give punitive without compensatory if you found liability.* Do you understand?

(Jury nodding.)

Ex. B, Trial Transcript, April 25, 2012 at 139, ll. 16-25; at 140, ll. 1-4 (emphasis added).

The Court's supplemental instruction was a misstatement of the law.

Prior to 2004, it was black letter law that a jury could award punitive damages in the absence of compensatory damages *so long as* it first found liability and awarded nominal damages. *See, e.g., Robinson v. Cattaraugus County*, 147 F.3d 153, 161 (2d Cir. N.Y. 1998). In that case, the jury made the same inquiry, in sum or in substance, of the district court as it did

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here (*i.e.*, can punitive damages be awarded in the absence of compensatory damages?). The Second Circuit held that the district court properly gave the following instruction in response to the jury's question:

[t]he Supreme Court has expressed the law that there are circumstances where a jury can find that there has been violation of a person's constitutional right, but then under the circumstances they find that there is no compensatory damage, that is, there is no pain and suffering, there is no lost wages, there are no other elements of any compensatory damage. In that case the Supreme Court says that it is proper to make an award of nominal damage, usually in the amount of one dollar. *And if there is a finding of liability, if there is a finding that there should be an award of nominal damage, even if there are no additional compensatory damages found, then the jury may go to consider whether or not punitive damages should be awarded under the circumstances.*

Robinson, 147 F.3d at 161 (emphasis added).

However, in 2004, a bedrock principle – that jurors could award nominal damages in constitutional rights deprivation cases – was altered by the Second Circuit in its decision in *Kerman v. City of New York*, 374 F.3d 93, 124 (2d Cir. N.Y. 2004). In the *Kerman* case, the court held that “where [a] plaintiff was indisputably deprived of his liberty, and the conduct of the defendant responsible for the deprivation was found to be unlawful, we have held that the plaintiff is entitled to compensatory, not merely nominal, damages.” Because the jury awarded nominal damages, the Second Circuit reversed and remanded for a new trial. Under *Kerman*, nominal damages are no longer available for loss of liberty claims.

Robinson and *Kerman* address different issues, and are in tension with one another. *Kerman*'s effect on the question of whether punitive damages may be awarded in the absence of compensatory damages, if any, is unclear.

In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003), the Supreme Court again addressed the interrelationship between compensatory and punitive damages. In that case, it held that punitive damages must have a proportionate ratio to compensatory damages in

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order to comport with due process.¹ It further held that the \$145 million punitive damage award in that case did not satisfy due process, and reversed and remanded for a remittitur or new trial. In so holding, the Supreme Court reasoned as follows:

[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore*, supra, at 575. We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. 517 U.S., at 576-577. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. *It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.* *Id.*, at 575.

State Farm, 538 U.S. at 419 (emphasis added).

As a result of *State Farm*, the landscape with respect to the relationship between compensatory and punitive damages has shifted. Nevertheless, defendants submit that, as articulated by the U.S. Supreme Court in *State Farm*, punitive damages are *not* recoverable in the absence of compensatory damages. *State Farm* effectively overruled *Robinson*.

Therefore, the Court erred when it gave a supplemental instruction to the jury to the effect that that punitive damages may, in fact, be awarded in the absence of compensatory damages. Moreover, given the language of the supplemental jury instruction, the jury is now

¹ The Court's reasoning was as follows: "Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, [footnote omitted] few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In *Haslip*, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. 499 U.S., at 23-24. We cited that 4-to-1 ratio again in *Gore*. 517 U.S., at 581." *State Farm*, 538 U.S. at 425 (2003).

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compelled to award both compensatory and punitive damages. Defendants do not believe a curative instruction is possible in light of the fact that the jury has already been given two charges on the issue. Accordingly, defendants have no choice but to request a mistrial.

POINT II

**THE COURT MISSTATED THE LAW WITH
RESPECT TO PLAINTIFF'S SEEKING
MENTAL AND EMOTIONAL DAMAGES.**

Prior to instructing the jury, the Court heard argument on defendants' objections to the charge. After such argument, the Court inserted the following instruction into the jury charge: "Plaintiff claims as the injury that he spent four and a half months in jail. *He is not seeking recovery for any emotional or psychological injuries.* He is not seeking recovery for loss of earnings." Jury Charge, April 25, 2012, Section IV (Damages), Part A (Compensatory Damages) at p. 11 (emphasis added).

However, during the charge, the Court added new language which fundamentally altered the import. The Court stated:

THE COURT:

The plaintiff claims as the injury that he spent four and a half months in jail. He is not seeking recovery for any emotional or psychological injuries. He is not seeking recovery for loss of earnings. *That is, for any emotional or psychological injuries that continued after the jail. He is seeking damages for the time he spent in jail.*

Ex. B, Trial Transcript, April 25, 2012 at 126, ll. 15-20 (emphasis added).

This is an incorrect statement of the case. He is not seeking to recover for emotional or psychological injuries at all. He is seeking damages for loss of liberty.

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POINT III

**THE COURT PERMITTED PLAINTIFF TO ASK THE
JURY TO “SEND A MESSAGE” NOT JUST TO THESE
DEFENDANTS BUT TO ALL PUTATIVE MALFEASORS.**

During plaintiff's closing argument, he stated as follows:

MR. NORINSBERG:

But there's one section, the last section on
punitive damages, that I do want you to take very seriously.
Punitive damages gives you an opportunity to speak your voice
and actually be heard as a juror. *You can send a message to
these two Defendants.*

MS. CASTRO: Objection.

MR. NORINSBERG: *You can send a message.*

THE COURT: You may continue your argument.

MR. NORINSBERG: *You can send a message through your
verdict, not just to these two Defendants, but to any other
police officer out there that thinks it's okay to get in front
of a grand jury and lie. You can send a message to any
other police officer out there that thinks it's okay.*

THE COURT: Strike that reference to before the
grand jury.

MR. NORINSBERG: *You can send a message to any other
police officer that thinks it's okay to tell a prosecutor
something that's completely false, and say, you know what, you
can't do that. You actually cannot do that in our system.
You will be accountable. And that's what we're going to ask
you to do at the end of the day is listen to all of the
evidence, work through it carefully. But if you do that and
you honor the pledges you made in your jury selection, you're
going to get the right result, and that's to hold these two
Defendants responsible for putting this man in jail for four
and a half months. Thank you.*

THE COURT: Thank you.

Ex. B, Trial Transcript, April 25, 2012 at 92, ll. 22-25; at 93, ll. 1-23 (emphases added).

Defendants submit that this line of argument is inflammatory, highly prejudicial, and
should have been excluded. *See, e.g., Morales v. City of New York*, 2000 U.S. Dist. LEXIS
18711 (S.D.N.Y. 2000) (allowing plaintiff's motion for remittitur or new trial where punitive
damage award was excessive; concluding, *inter alia*, that “[t]he plaintiff's summation asked the

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jury to 'send a message' to the police by their verdict. While this plea was made in connection with the argument on punitive damages, the jury may not have appreciated that such an argument was only relevant to a determination of punitive damages.').

POINT IV

**BECAUSE DEFENDANTS WERE PRECLUDED
FROM INTRODUCING EVIDENCE OF
PLAINTIFF'S PRIOR INCARCERATIONS, ANY
DAMAGE AWARD IS SPECULATIVE.**

Assuming the jury returns a damages award for loss of liberty, the defense was precluded from eliciting testimony concerning plaintiff's prior criminal convictions and incarcerations so there is nothing in the record from which the jury can base a damage award. Any such award would be purely speculative.

Defendants have repeatedly moved that the court permit defendants to elicit testimony or cross-examining plaintiff as to his criminal history. It is well-established law that such history goes directly to damages. *See Banushi v. Palmer*, 08-CV-2937(KAM)(JO), 2011 U.S. Dist. LEXIS 419, *7-9 (E.D.N.Y. Jan. 4, 2011) (admitting evidence of plaintiff's prior arrests in trial involving false arrest claim to mitigate plaintiff's claim of damages and noting, "a plaintiff 'who has had a number of prior arrests and detentions is likely to have suffered less distress than one who has never before been detained'"). During trial, plaintiff Marshall testified on direct as to his emotional injury from being incarcerated. Accordingly, the number of his prior incarcerations is both admissible and highly relevant to damages.

POINT V

**PLAINTIFF IMPROPERLY ARGUED
DURING CLOSING THAT DEFENDANTS
MADE MISLEADING STATEMENTS TO
THE GRAND JURY, WHICH IS NOT A**

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**PROPER BASIS FOR LIABILITY UNDER
REHBERG.**

Finally, in his closing, plaintiff's counsel improperly argued that the defendants mislead the "grand jury." He argued:

MR. NORINSBERG:

Now, you'll see the sections on compensatory damages, I don't even want to touch that with you. I want this case -- I don't want to taint this about this case being a money case. This is about holding these officers accountable. Whatever value you put on it is fine. It's about showing that you were not fooled like these other people. *You weren't mislead like the grand jury.* You see the light here. You understand what happened.

Ex. B, Trial Transcript, April 25, 2012 at 92, ll. 14-21 (emphasis added).

Plaintiff's counsel made additional references to defendants' having mislead the grand jury several other times during his closing. *See, e.g.*, p. 74, line 8 ("What he told the *grand jury* was a lie."); p. 76, line 1 ("What he told that *grand jury* is a lie."); p. 79, line 17 and 20-21. When he appeared before the *grand jury*, one story. When he appeared in the civil lawsuit, another story. ** He testified under oath in front of that *grand jury* that what happened was he had this conversation with Marshall that he said, "Sir, can I talk to you for a minute?"; and p. 93, lines 10-11 ("You can send a message through your verdict, not just to these two Defendants, but to any other police officer out there that thinks it's okay to get in front of a *grand jury* and lie.") (emphases added).

His argument is misleading and confusing. It may give the jury reason to believe that misstatements to the grand jury is a basis for liability, which it is not under the U.S. Supreme Court's recent decision in *Rehberg v. Paulk*, 2012 U.S. LEXIS 2711, *23-24 (Apr. 2, 2012). *See*

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id. (holding that grand jury witnesses are entitled to absolute immunity from “any § 1983 claim based on the witness’ testimony”).

POINT VI

**THE COURT MISREAD THE JURY CHARGE
WITH RESPECT TO DEFENDANTS’
POTENTIAL LIABILITY FOR TESTIMONY
BEFORE THE GRAND JURY IN
CONTRAVENTION OF REHBERG.**

During the jury charge, the Court misread a crucial instruction. The Court stated:

THE COURT

Did Officer Randall violate the plaintiff’s
constitutional right to a fair trial by knowingly presenting
*false evidence to the prosecutor? I’m sorry, in preparation
for the grand jury.*

Ex. B, Trial Transcript, April 25, 2012 at 129, ll. 8-12 (emphasis added).

Even though the Court corrected the mistake, the confusion created on a crucial point is highly prejudicial.

POINT VII

**DEFENDANTS REQUEST THE ATTACHED
SPECIAL INTERROGATORIES.**

Finally, defendants request that the attached special interrogatories be given to the jury after it has reached its verdict. *See* Exhibit A.

CONCLUSION

For the foregoing reasons, defendants Police Officers Salim Randall and Michael Burbridge respectfully request that the Court grant their motions in their entirety and for such other and further relief as the Court deems just and proper.

Dated: New York, New York
April 26, 2012

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EXHIBIT A

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
JOSHUA MARSHALL,
Plaintiff,
-against-
POLICE OFFICER SALIM RANDALL and POLICE
OFFICER MICHAEL BURBRIDGE,
Defendants.
-----X

10 Civ. 2714 (JBW)(VVP)

Special Interrogatories

1) Was it reasonable for Officer Randall to believe that plaintiff had a gun.

Yes _____ No _____

2) Was it reasonable for Officer Burbridge to believe that plaintiff had a gun.

Yes _____ No _____

3) Did Officer Randall knowingly mislead the prosecutor to procure an indictment.

Yes _____ No _____

4) Did Officer Burbridge knowingly mislead the prosecutor to procure an indictment.

Yes _____ No _____

5) Did Officer Randall knowingly present false information to the prosecutor.

Yes _____ No _____

6) Did Officer Burbridge knowing present false information to the prosecutor.

Yes _____ No _____

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EXHIBIT B

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1	2
<p>UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK</p> <p>JOSHUA MARSHALL, Plaintiff,</p> <p>versus</p> <p>THE CITY OF NEW YORK, Defendant.</p> <p>United States Courthouse Brooklyn, New York</p>	<p>PROCEEDINGS</p> <p>Court Reporter: Judi Johnson, RPR, CRR, CLR Official Court Reporter Telephone: (718) 613-2582 Facsimile: (718) 613-2380 E-mail: Judi_Johnson@nyed.uscourts.gov</p> <p>Proceedings recorded by computerized stenography. Transcript produced by Computer-aided Transcription.</p>
<p>10-CV-02714 (JBW)</p> <p>April 25, 2012 9:30 A.M.</p> <p>***VOLUME II**</p> <p>CONTINUED TRANSCRIPT OF TRIAL. Before: HON. JACK B. WEINSTEIN, UNITED STATES DISTRICT JUDGE</p> <p>APPEARANCES:</p> <p>FOR THE PLAINTIFF:</p> <p>COHEN & FITCH, L.L.P. Attorneys for the Plaintiff Woolworth Building 233 Broadway - Suite 1800 New York, New York 10007</p> <p>BY: GERALD M. COHEN, ESQ. JON NORINSBERG, ESQ.</p> <p>For the Defendants:</p> <p>NEW YORK CITY LAW DEPARTMENT Attorney for the Defendant 100 Church Street New York, New York 10007</p> <p>BY: FELICIA GROSS, ESQ. JULIANA CASTRO, ESQ. FRANCES SANDS, ESQ.</p>	<p>JUDI JOHNSON, RPR, CRR, CLR - Official Court Reporter</p>
JUDI JOHNSON, RPR, CRR, CLR - Official Court Reporter	JUDI JOHNSON, RPR, CRR, CLR - Official Court Reporter

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<p>PROCEEDINGS</p> <p>(In open court.)</p> <p>COURTROOM DEPUTY: All rise. The United States District Court for the Eastern District of New York is now in session. The Honorable JACK B. WEINSTEIN is now presiding. (Honorable JACK B. WEINSTEIN takes the bench.)</p> <p>COURTROOM DEPUTY: Calling civil trial proceedings in Docket no. 10-CV-2714, Joshua Marshall against The City of New York.</p> <p>THE COURT: Marshall v. Randall and Burbridge. I have the defendants' brief in support of multiple trial motions.</p> <p>MR. COHEN: Your Honor, may I step outside just to get my co-counsel?</p> <p>THE COURT: If he's here.</p> <p>MR. COHEN: He's here.</p> <p>MS. CASTRO: Your Honor, I will step out and get my co-counsel as well.</p> <p>(A brief pause.)</p> <p>THE COURT: I've gone over this brief in support of the defendants' multiple trial motions. Thank you very much for getting this in early. It was helpful to be able to read it early this morning.</p> <p>I'll briefly summarize the conclusions I have and changes I'm making, and then if it's necessary, we can have further argument.</p>	<p>PROCEEDINGS</p> <p>Defendants asked to be permitted to cross-examine the plaintiff as to his criminal history now that he has opened the door to such testimony. I don't think he's opened the door. That is denied.</p> <p>Second, plaintiff has improperly made an issue of the legal validity of the officers' initial approach in contravention of the Court's prior order. Defendants request a curative instruction and, in the alternative, a mistrial. As I explained yesterday, there was no contravention of the Court's prior order. The testimony was properly limited to the period from which the defendants had first observed the plaintiff to the time of arrest.</p> <p>Defendants asked for a mistrial, which is denied on the merits.</p> <p>Third, defendants should be permitted to cross-examine plaintiff as to his emotional and psychological injuries. He's not seeking damages. And I'll modify the charge, as I'll explain in a moment, to make that clear.</p> <p>Fourth, defendants should be permitted to mention in closing that the criminal case was dismissed on Speedy Trial rules. I've already dealt with that, and I see no reason to reopen that. It's been discussed repeatedly.</p> <p>Defendants request a curative instruction as to the import of the grand jury's indictment. That's five, and it's combined really with six. Instruction of a presumption of</p>
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PROCEEDINGS	137	PROCEEDINGS	138
1 MR. COHEN: I believe it's the Second Circuit.		1 Honor. If I could just have one minute. Kerman is 374 F.3d	
2 MR. NORINSBERG: Second Circuit.		2 93. It's a Second Circuit decision from 2004. And if you	
3 MR. COHEN: I have the case cite in my bag.		3 look at Pages 123 to 125, the quote is -- well, what I've	
4 MR. NORINSBERG: It's definitely Second Circuit.		4 quoted for is "recognizing that loss of liberty and emotional	
5 MR. COHEN: I'm sure it was referenced in my motion		5 injuries are independent of each other and" --	
6 in limine papers, your Honor.		6 THE COURT: Start again.	
7 THE COURT: Why didn't you object to the charge?		7 MR. COHEN: -- "the tort of false arrest and	
8 MR. NORINSBERG: We did. That's why we opposed		8 malicious prosecution are complete with even a brief restraint	
9 nominal damages. If there's a deprivation of liberty in any		9 of the Plaintiff's freedom, it is not necessary that any	
10 magnitude, Kerman says there has to be an award of some		10 damages result from it other than the confinement, itself."	
11 monetary compensation.		11 That's just for the portion that states that the	
12 THE COURT: You disagree?		12 loss of freedom is a compensatory damage. But I believe,	
13 MS. SANDS: We disagree, your Honor.		13 later on in the case, it talks about how there must be	
14 THE COURT: Have you got a case?		14 compensatory damages if a loss of liberty is found.	
15 MS. SANDS: We don't have a case handy, but we		15 THE COURT: Bring in the jury.	
16 certainly disagree that -- I know the case you just read, but		16 MS. SANDS: Your Honor, I believe that case focused	
17 we feel there has to be liability before they can --		17 on nominal damages, basically nominal damages if the jury	
18 THE COURT: Well, of course there has to be		18 found that there was a breach of constitutional rights.	
19 liability. That's not what we're talking about.		19 THE COURT: There has to be some damages.	
20 MR. NORINSBERG: Your Honor, the jury might		20 MS. SANDS: They couldn't be nominal. They would	
21 asking that question: If they don't find liability, can they		21 have to be --	
22 still award punitive damages?		22 THE COURT: But everybody agreed to strike the	
23 THE COURT: There has to be liability. What is the		23 nominal. I thought that the nominal was appropriate, but I'll	
24 citation?		24 bring in the jury and tell them they have to find some	
25 MR. COHEN: I'm looking for my motion papers, your		25 damages.	

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PROCEEDINGS	139	PROCEEDINGS	140
1 Bring in the jury.		1 question, "Can we give punitive awards without giving	
2 (The jury entered.)		2 compensatory," theoretically, you can. You can give punitive	
3 THE COURT: I want to correct what I think is in an		3 without compensatory if you found liability. Do you	
4 error in the charge. As suggested in your note, Court		4 understand?	
5 Exhibit 9, "Can we give punitive award without giving		5 (Jury nodding.)	
6 compensatory?"		6 THE COURT: But it's hard for me to see how if you	
7 First, if he was deprived of a constitutional		7 find liability and you find that he was deprived of his	
8 right -- that is, there is liability -- that's the first		8 liberty, you cannot give him some compensatory damages. I'm	
9 question. In order to give damages, there has to be		9 not telling you what to do, but it does seem to me that once	
10 liability. Do you all understand that?		10 you find liability which caused a deprivation of his	
11 (Jury nodding.)		11 liberty -- either for four and a half months or for a lesser	
12 THE COURT: Anybody have any question about this?		12 time while he was arrested, et cetera -- that's all	
13 If there's no liability, there's no damages. Do you		13 deprivation.	
14 understand that? Everybody understand that?		14 You've got to find some violation first, some	
15 (Jury nodding.)		15 liability. Then, after you find liability as -- if you do, as	
16 THE COURT: Assuming you find liability -- and		16 I suggested, the next thing is compensatory damages. Now, if	
17 not saying you should or shouldn't, do you understand? If you		17 you do find liability, it's, again, hard for me to see how you	
18 find liability, and flowing from that liability as a proximate		18 cannot find some compensatory damages and he would be entitled	
19 cause was deprivation of the Plaintiff's liberty, either while he		19 to compensatory damages for a deprivation. Do you understand	
20 was arrested in violation of his rights -- if you find that --		20 that?	
21 or for another reason in violation of his rights, he was		21 (Jury nodding.)	
22 incarcerated for a substantial length of time, then he is		22 THE COURT: If the deprivation was caused by the	
23 entitled to compensatory damages. Do you understand that?		23 denial. Do you understand?	
24 (Jury nodding.)		24 (Jury nodding.)	
25 THE COURT: How much is for you to decide. So		25 THE COURT: Therefore, the question of whether we	

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PROCEEDINGS	125	PROCEEDINGS	126
1	prosecutor, leading to a deprivation of the plaintiff's	1	damages merely because I am instructing you. It's exclusively
2	liberty. If a defendant presented accurate evidence to the	2	your function to determine liability and damages.
3	prosecutor or presented false evidence thinking it was true,	3	He's seeking first compensatory damages. If
4	then you must find for the defendant. And I've already told	4	liability is proven on one of the claims, you will award the
5	you a few moments ago that what was told to the prosecutor in	5	plaintiff sufficient damages to compensate him for any injury
6	the grand jury room or in preparation is not what we're	6	proximally caused by one of the defendants' actions in
7	talking about here. It's at other times.	7	creating the liability. Damages of this type is known as
8	Do you understand that?	8	compensatory damages. Their purpose is to make the plaintiff
9	(Jury nodding.)	9	whole, that is, to give back, to the extent that money can,
10	THE COURT: The third element that plaintiff must	10	the problem or injury that he -- for the injury that he
11	prove is that the acts of Officer Randall and officer	11	suffered. Those damages should be fair and reasonable,
12	Burbridge were a proximate cause of injuries he sustained.	12	neither inadequate nor excessive, and they should be only for
13	There can be more than one cause that's proximate.	13	injuries the plaintiff suffered or is reasonably likely to
14	An injury or damage is proximally caused by an act	14	suffer as a proximate result of an injury claimed and proved.
15	or failure to act whenever the act or omission played a	15	The plaintiff claims as the injury that he spent
16	substantial part in bringing about or actually causing the	16	four and a half months in jail. He is not seeking recovery
17	injury or damage and that the injury was the direct or	17	for any emotional or psychological injuries. He is not
18	reasonably probable consequence of the act or omission.	18	seeking recovery for loss of earnings. That is, for any
19	To recover damages, Marshall has the burden, that	19	emotional or psychological injuries that continued after the
20	is, the plaintiff, of proving that he suffered an injury and	20	jail. He is seeking damages for the time he spent in jail.
21	that the injury would not have occurred without the wrongful	21	In awarding compensatory damages, be guided by
22	conduct of a defendant.	22	dispassionate common sense. Use such definitiveness and
23	If you find the plaintiff has proven one of his	23	accuracy as the circumstances permit.
24	three claims, you are going to have to determine damages, if	24	Each defendant is entitled to fair, separate and
25	any, that he sustained and proved. Don't infer that he had	25	individual consideration both as to liability and as to
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PROCEEDINGS	127	PROCEEDINGS	128
1	damages. It's as if you were trying two separate trials at	1	You may assess punitive damages or any damages
2	the same time.	2	against either or both of the defendants, or in the case of
3	Is that clear to you?	3	punitive damages, you may refuse to assess them at all.
4	(Jury nodding.)	4	If punitive damages are assessed against more than
5	THE COURT: If you find that only one is responsible	5	one defendant, the amount may be the same or may be different.
6	for a particular injury, then you must impose damages, if any,	6	When you begin your deliberations, don't communicate
7	for that injury only upon that defendant. If you find no	7	with anybody outside the jury room except in writing through
8	injuries by any of the defendants, then you'll rule	8	the marshal, who will give me the note, and then I'll
9	accordingly.	9	communicate back or call you back into court.
10	The plaintiff is also asking for punitive damages.	10	You can ask for help on the law or anything else.
11	Should you award compensatory damages, you may award	11	Be respectful to each other when you're having your
12	additional punitive damages if you find that a defendant	12	discussions. Don't hesitate to change your mind after
13	engaged in extraordinary misconduct. You may do so to express	13	considering what other people say, but each of you is entitled
14	your disapproval and to serve as an example or warning to	14	to your individual vote and must exercise your individual
15	others who might otherwise engage in similar conduct.	15	judgment. And when the verdict comes in, you will each be
16	If you find in favor of plaintiff and against the	16	asked if that is your verdict.
17	defendant and if you finds that the defendant acted so	17	Don't tell me how the vote stands until you come
18	maliciously, wantonly or oppressively as to warrant an award	18	into court. If you've reached a verdict, don't report to me
19	of punitive damages, you may make such an award.	19	what it is. You will be asked that in open court. Inform the
20	To justify an award of punitive damages, a	20	Court in writing when you've reached a verdict without
21	defendant's misconduct must be based upon a reckless or	21	indicating what that verdict is.
22	callous disregard of the rights of the plaintiff or a gross	22	You'll render your verdict without fear or without
23	indifference treasure them. You may also award punitive	23	favor, without prejudice and without sympathy.
24	damages if a defendant acted to punish the plaintiff out of	24	Now, these are the questions you'll have to answer.
25	ill will or spite.	25	First, did Randall falsely arrest the plaintiff?
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A 1399

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PROCEEDINGS	89	PROCEEDINGS	90
1 years? No one ever talked to him. This man was so		1 it from the lawyer. My point is this: How real is that	
2 unimportant that the D.A.'s office never interviewed him, let		2 testimony? It's four years after the fact meeting with their	
3 alone him testifying in front of a grand jury. And this guy,		3 lawyers. And at the end of the day, it really doesn't change	
4 he comes in here. What's the one thing, the one undisputed		4 any of the dynamics in this case at all.	
5 fact we get out of him? He didn't see who threw the gun. He		5 The one part, I don't know if you believe it, I	
6 did not see who threw the gun. That's the number one fact,		6 don't think this guy actually saw anything. Even if you	
7 and with good reason.		7 believed his story they saw Meade's hands, that just would	
8 The man's driving the wrong way down a one-way		8 make perfect sense to this whole story of what happened.	
9 street at night in an area where you have several stores that		9 Meade is going along. He's the one that tosses the gun. He's	
10 are open 24 hours, and of course he's paying attention to		10 the one worried about the cops. Officers, look, I got nothing	
11 what's ahead of him. He's not looking. What did he actually		11 here. What normal person would walk down the street, and when	
12 remember? This man said he did thousands of arrests, over a		12 police are coming, would go like this? That doesn't make	
13 thousand in his career. And yet, four years later, he's		13 sense. He's doing it because he's got the guilty conscience.	
14 contacted for the first time. And wouldn't you know it, he		14 He knows he just tossed that gun. He wants to make sure the	
15 just remembers in great detail this particular case. Of		15 officers think it's not him. And guess what? It worked. It	
16 course, it comes out that his memory was somewhat refreshed		16 worked.	
17 when he was able to meet with the lawyers from the Defendant		17 The bottom line is this, ladies and gentlemen. Your	
18 in this case.		18 questions are going to come down to what they call a verdict	
19 And we're seeing what happens here. We saw an		19 sheet. I'm just going to walk through this very briefly with	
20 example with Officer Burbridge. Remember, I questioned him		20 you. You'll get it again. You're going to have copies of it.	
21 yesterday about this. During his deposition, Officer		21 You'll have a chance to go through this extensively.	
22 Burbridge couldn't think of the right answer. We had a break		22 Essentially, there are three main questions: Was Mr. Marshall	
23 and all of a sudden, the answers came flowing. We saw how		23 falsely arrested by these two Defendants; was he maliciously	
24 Officer Randall was only too happy to adopt the term, his		24 prosecuted; was he denied a right to a fair trial by the false	
25 "associate." He started using that in his direct after hearing		25 evidence?	

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PROCEEDINGS	91	PROCEEDINGS	92
1 Now, I suggest to you all of those questions turn on		1 THE COURT: You may continue your argument.	
2 the very first thing that we talked about when I started my		2 MR. NORINSBERG: -- defense counsel got up in your	
3 closing argument today: Did Marshall have a gun on him?		3 opening and said this is just an open-and-shut case. We	
4 Marshall did not have gun on him, if the answer to that		4 actually want you to think about it. When you think about it,	
5 question is no, he did not have a gun, then the answer to all		5 let's say some of you still are not sure. You don't know	
6 of the questions on the verdict sheet is yes. Now, if		6 where you are. The first questions, the first two questions	
7 Marshall actually had the gun, if you still believe that after		7 on false arrest, the Defendants actually have the burden of	
8 everything you've heard, then of course, he's not entitled to		8 proof on those questions. You'll hear that from the judge.	
9 anything. You throw him out. That's your job as jurors.		9 They have the burden to prove that they had grounds to arrest	
10 But if you actually think through this and believe		10 Marshall, not us. We have the burden on the other two claims.	
11 that these officers gave false information to the prosecutors,		11 But on those first two questions, for some of you, if you're	
12 they duped the prosecutors because the prosecutors weren't		12 not comfortable with that, they have the burden. If they fail	
13 on the street. They duped it and put it over on the grand		13 to meet their burden, they lose on that claim.	
14 jury with these false stories. If you believe that's what		14 Now, you'll see the sections on compensatory	
15 happened, then the Marshall to not having a gun, the answer		15 damages, I don't even want to touch that with you. I want	
16 all the answers on the verdict sheet is yes. It's yes.		16 this case -- I don't want to taint this about this case being	
17 And then, you'll see there's a question. When		17 a money case. This is about holding these officers	
18 they're talking about maliciously prosecuting, just so you		18 accountable. Whatever value you put on it is fine. It's	
19 understand, our view is simply this: They're feeding false		19 about showing that you were not fooled like these other	
20 information. They may not be the prosecutors, per se, but		20 people. You weren't misled like the grand jury. You see the	
21 they're feeding that information. Now, one thing on the first		21 light here. You understand what happened.	
22 two questions on false arrest. Let's say some of you -- and I		22 But there's one section, the last section on	
23 know there's room for a healthy discussion about all this case		23 punitive damages, that I do want you to take very seriously.	
24 and the facts. It's not like the attorneys --		24 Punitive damages gives you an opportunity to speak your voice	
25 MS. CASTRO: Objection.		25 and actually be heard as a juror. You can send a message to	

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A 1400

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PROCEEDINGS	93	PROCEEDINGS	94
1 these two Defendants.		1 a quarter after one. Don't discuss the case.	
2 MS. CASTRO: Objection.		2 (The jury exited.)	
3 MR. NORINSBERG: You can send a message.		3 THE COURT: You have the jury charge with all the	
4 THE COURT: You may continue your argument.		4 corrections. And we've run off copies for the jury later.	
5 MR. NORINSBERG: You can send a message through		5 Enjoy your lunch. I'll see you at 1:15.	
6 verdict, not just to these two Defendants, but to any other		6 (A lunch recess was taken.)	
7 police officer out there that thinks it's okay to get in front		7 (Continued on the next page.)	
8 of a grand jury and lie. You can send a message to any		8	
9 other police officer out there that thinks it's okay.		9	
10 THE COURT: Strike that reference to before the		10	
11 grand jury.		11	
12 MR. NORINSBERG: You can send a message to any other		12	
13 police officer that thinks it's okay to tell a prosecutor		13	
14 something that's completely false, and say, you know what, you		14	
15 can't do that. You actually cannot do that in our system.		15	
16 You will be accountable. And that's what we're going to ask		16	
17 you to do at the end of the day is listen to all of the		17	
18 evidence, work through it carefully. But if you do that and		18	
19 you honor the pledges you made in your jury selection, you're		19	
20 going to get the right result, and that's to hold these two		20	
21 Defendants responsible for putting this man in jail for four		21	
22 and a half months. Thank you.		22	
23 THE COURT: Thank you. Lunch will be up at 12:30.		23	
24 Do you want to take a break now, and then get back here at		24	
25 about quarter after one, take a break now? We'll continue at		25	
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PROCEEDINGS	95		96
1 (Honorable Jack B. Weinstein takes the bench.)		1 is a long time to remember every single detail of what	
2 (Jury is in the courtroom at 1:20 p.m.)		2 occurred. However, the evidence has shown that Officer	
3 THE COURT: Be seated, please. Proceed.		3 Randall is consistent in the important facts of this case. He	
4 CLOSING STATEMENT BY THE DEFENSE		4 knows what he saw and he knows what he heard. He knows that	
5 MS. CASTRO: Good afternoon, ladies and gentlemen.		5 he saw the plaintiff pull an object out of his waistband, make	
6 JURORS: Good afternoon.		6 a pitching motion, and he tossed it. He knows that he heard	
7 MS. CASTRO: I want to start off by thanking you for		7 the sound of the metal cling on the ground. He said that that	
8 your careful attention that you paid throughout the course of		8 is the most unmistakable sound that he knows for a fact that	
9 this trial. On behalf of my client, Police Officers Michael		9 that's the sound of a gun hitting the ground. He's been	
10 Burbidge and Salim Randall, as well as my co-counsel, we		10 consistent throughout his testimony in saying that.	
11 would like to thank you for the careful attention that you		11 Now, the second reason he wants to attack Officer	
12 will also give to your deliberations in deciding this case.		12 Randall's credibility is because of his paperwork, his arrest	
13 Now, I do have some remarks that I want to go		13 paperwork, to be specific. And he spent a lot of time harping	
14 through and discuss our case, but I want to start off by		14 on the detail section of the arrest report. He wants you to	
15 addressing some of the points that were made by plaintiff's		15 believe that that section was left blank, that was his word,	
16 counsel in his summation a little while ago.		16 that was counsel's word, that he left that section blank, that	
17 Now, first off, with respect to Officer Randall,		17 he didn't put any information about what happened.	
18 plaintiff's counsel started off by trying to attack his		18 Now, he didn't show you that paperwork during	
19 credibility. He wanted you to believe that he's not a		19 summation, but it was admitted into evidence and you're going	
20 credible witness and he gave you a few reasons for that. One		20 to have a chance to review it. Now, that arrest report is	
21 of the first reasons he gave you is because he says that there		21 Plaintiff's Exhibit 6. And the detail section, if you look at	
22 are inconsistencies in his testimony.		22 it, says at TPO, which is time, place of occurrence, above	
23 Now, as plaintiff's counsel went through and told		23 defendant named Joshua Marshall was found in the possession of	
24 you repeatedly, this happened four years ago. Four years ago		24 a loaded firearm, and it even specifies a serial number.	
25		25 That's not blank. That's a play on his words. And it's a	
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A 1401

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PROCEEDINGS	73	PROCEEDINGS	74
1 "ANSWER: That is correct."		1 that refresh your memory that you told Ms. Phillips that you	
2 Well, what part of that is unclear? He was asked		2 never saw this gun in his possession?"	
3 point blank whether he ever saw it in his physical possession,		3 "No, it doesn't refresh my memory. I never said	
4 and he said no. He agreed it was correct. Now, if he never		4 that."	
5 saw this object in the physical possession of Mr. Marshall,		5 Well, of course, he can't admit saying it. If he	
6 why did he swear under oath to a grand jury that he did see		6 admits he told prosecutor number two that he didn't see the	
7 it? I mean, those two stories aren't true; either you saw it,		7 gun in Marshall's possession, then what he told prosecutor	
8 or you didn't. Why did he tell the district attorney that he		8 number one was a lie. What he told the grand jury was a lie.	
9 saw this gun in the actual possession of Mr. Marshall?		9 So he can't admit that he made that statement.	
10 He said those things. And then, he changes his		10 And then, I asked him, I said, "Sir, didn't you also	
11 testimony during the course of these proceedings. It's		11 make a statement to the gun enhancement unit, your fellow	
12 dishonest. The truth came out at his deposition. He never		12 colleagues at the NYPD? Didn't you tell them you didn't see	
13 actually saw the possession. How else do we know that? Think		13 this gun in his possession?"	
14 about some of the statements that he made to other people.		14 "I never said that."	
15 Remember, folks, when I was asking him, I said, "Did you make		15 I said, "Well, that's funny. That's not what you	
16 a statement to another prosecuting attorney that you never saw		16 said at your deposition."	
17 him in possession of a gun?"		17 At your deposition, you said, "Actually, it's	
18 "What, who, what prosecuting attorney? Who are you		18 possible I did say that. I can't really remember."	
19 talking of?"		19 Now, how is it possible, if he's saying these things	
20 I said, "The prosecutor, Judy Phillips; did you make		20 now, he comes in here and he says that Marshall was in	
21 a statement to her? Didn't you tell Ms. Phillips that you did		21 possession of a gun, and yet, at his deposition, he said that	
22 not see that gun in his possession? Didn't you tell her		22 he wasn't. He tells this prosecutor, the second prosecutor,	
23 that?"		23 he wasn't. And he tells the gun enhancement unit he wasn't.	
24 "I never said that."		24 Three different times, he said he wasn't. But you're supposed	
25 Then, I show him a document. And I said, "Sir, does		25 to believe, the one time that he told the first D.A., that	
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PROCEEDINGS	75	PROCEEDINGS	76
1 that's the true statement.		1 a court of law. What he told that grand jury is a lie. And	
2 This whole case, it's about credibility. Your		2 the truth only came out when we started this civil lawsuit	
3 job -- I told you this in opening statement -- it requires the		3 under oath.	
4 highest level of concentration to put together the pieces.		4 What's the next thing he says? He says he actually	
5 This isn't going to be easy. You have to work through this		5 saw with his own eyes -- he's certain about this, too, there's	
6 evidence logically, think about these things. Why something		6 no mistake. He saw Marshall actually toss the gun away. Sure	
7 on such a critical fact, how does that change over time?		7 you did, Officer, just like you saw Mr. Marshall's eyes	
8 What's the next thing that he says? The next thing		8 bulging from 150 feet away across the street in the dark,	
9 he tells you, he tells you that he saw Marshall pull out the		9 right? Let's think about it. What actually did this man see?	
10 gun. He saw him pull out the object from his waist. That's		10 He's sitting in the back seat of a car. He's got a driver in	
11 funny. That's not what you said at your deposition, Officer.		11 front of him, he's got a passenger in front of him. He's up	
12 At your deposition, you said you didn't see any object pulled		12 to 25 feet away. And Marshall's back is towards him. How	
13 out of his waist.		13 exactly is he seeing this?	
14 And again, don't rely on what I'm telling you.		14 Of course, it doesn't make sense. That's why they	
15 Let's look at the actual evidence. This is on Page 33 of this		15 have to change the story ever so slightly. The story is	
16 man's deposition under oath. "QUESTION: The object that		16 changed so that there's an angle and Marshall kind of twists,	
17 saw him pull out of his pants?"		17 Does that make sense? He's going to twist. Marshall's trying	
18 "ANSWER: I didn't see the object as he pulled it		18 to throw the gun away and hide it because he sees the police	
19 out of his pants."		19 coming. But here, Officer, look what I have, a gun. I'm	
20 So if you didn't see the object as he pulled it out		20 throwing it into the street. Does that make sense? You have	
21 of his pants, why did you tell the grand jury under oath that		21 to use your common sense here. So much of this case is	
22 you saw him pull a firearm out of his pants? That's a lie.		22 thinking through the evidence and using logic and deductive	
23 He lied. Now, you folks have the power. You can just look		23 reasoning to work through it and figure out what's true and	
24 the other way. And you can let him say it doesn't matter,		24 what's not true. His whole story doesn't make sense.	
25 these things happen, or you can hold him accountable. He's		25 But what's even more telling, look at the paperwork.	
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PROCEEDINGS	77	PROCEEDINGS	78
1 This man's the arresting officer. Now, he said at his		1 They hadn't quite come up with exactly how they were going to	
2 deposition he has no idea why he's the arresting officer. To		2 present this story. He didn't have those details. So that	
3 this day, he had no idea. But he's the arresting officer.		3 section of the report's blank. I asked him also, "What about	
4 Look at his arrest paperwork. He gives a version, he fills		4 the complaint report? You didn't mention anything on the	
5 out the form. There's a section on the form that actually is		5 complaint report, did you?"	
6 a box called "DETAILS." I said, "Officer, you agree that the		6 "Hey, don't blame me. That's not my complaint	
7 detail of pulling out the gun in the waist; that's an		7 report. You know, we all worked on that together. I didn't	
8 important fact?"		8 write it."	
9 And he agreed, "Yes, that's important."		9 Actually, you did write it. That's what you said in	
10 "In fact, it's very important, right?"		10 your deposition. I said, "Who prepared this report?"	
11 "Yes, it's very important."		11 "I did." He prepared the complaint report. Then,	
12 "But why isn't it anywhere in your report?"		12 he starts telling me, "Well, you see, it's so busy. We have	
13 Now, in his deposition, he said "no particular		13 all these documents we have to fill out and all these reports.	
14 reason," but now he came into you, because he has to explain		14 We all have to help each other out."	
15 it. It's going to look foolish, right? How is he going to		15 Really? What other documents? We've seen these	
16 explain this? He explains, "Actually, we don't really fill		16 documents generated; an arrest report, complaint report and	
17 out that section. You know, we just kind of pass it on to the		17 memo book entry. It's not like they didn't have enough time.	
18 D.A."		18 The man got six hours of overtime. He filled out a report.	
19 Really? Then why is there a section that says		19 He just doesn't want to own it because it makes him look bad	
20 "DETAILS" in large, capital letters? Why is it on the police		20 because there's no explanation for why he didn't have those	
21 report if you don't fill it out? These are the most important		21 details in.	
22 details of the entire case, that you saw him pull out the gun		22 But my personal favorite, the best one, was the last	
23 and toss it. And you didn't put that on your report?		23 one in the memo book entry. Does anyone here remember what	
24 I'll tell you why he didn't put it on the report,		24 this man said at his deposition? He said he didn't know what	
25 because at that point in time, he didn't have the details.		25 a memo book entry was for. This is an officer who's been on	
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PROCEEDINGS	79	PROCEEDINGS	80
1 the force for eight years. Eight years, testifying under oath		1 So what he was selling to that grand jury, he was	
2 in a deposition that he doesn't know what he's supposed to do		2 trying to make it sound like, man, I had this guy in my line	
3 with a memo book. Come on, are you folks buying this? Are		3 of vision. He's standing there right in front of me. I saw	
4 you going to buy this? There's no way this man is telling the		4 the whole thing. Then, all of a sudden, actually, come to	
5 truth in this case. It's one false, phony, dishonest claim		5 think of it, I wasn't standing in front of him on the	
6 after another.		6 sidewalk. That never happened. Actually, come to think of	
7 You can just look the other way and let it go if you		7 it, I was inside of a car 10 feet away still inside the car	
8 want, or you can hold him accountable. In our system, when		8 when he threw the gun.	
9 you testify under oath, it's serious business. This isn't		9 Well, which is it? First, this isn't a game you can	
10 just playing fast and loose with the facts, change the story		10 play with somebody's liberty and make up stories. How could a	
11 if you don't like your answer last year at the deposition.		11 story change so dramatically? This man's not taking this at	
12 Just come in here. The jury won't know. They weren't there.		12 all seriously, understanding that when he testified in front	
13 Come on, you folks know this. This is not right what he did.		13 of the grand jury, he's under oath to tell the truth.	
14 And you go beyond and you look at the other witness		14 And his paperwork is also an illustration of how the	
15 that we heard from, Officer Burbridge. Do you realize that		15 false and dishonest claims come in. Remember his form he	
16 this man told two completely different stories? When he		16 filled out, his stop-and-frisk form? That form, he said, "I	
17 appeared before the grand jury, one story. When he appeared		17 observed furtive movements before we made the stop."	
18 in the civil lawsuit, another story.		18 Actually, that's not what you said in your deposition. At	
19 Let's look at story number one. This is what he was		19 your deposition, you said you didn't observe anything	
20 telling to the grand jury. He testified under oath in front		20 suspicious.	
21 of that grand jury that what happened was he had this		21 And here's what he said, Page 66: "QUESTION: Did	
22 conversation with Marshall that he said, "Sir, can I talk to		22 you observe any furtive movements by Joshua Marshall before	
23 you for a minute?" And then, what he did was he stepped out		23 you decided to stop him?	
24 of his car in front of Marshall, and that's when Marshall		24 "ANSWER: No."	
25 threw the gun.		25 So if the answer to that is no, why did you lie in	
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PROCEEDINGS	93	PROCEEDINGS	94
1 these two Defendants.		1 a quarter after one. Don't discuss the case.	
2 MS. CASTRO: Objection.		2 (The jury exited.)	
3 MR. NORINSBERG: You can send a message.		3 THE COURT: You have the jury charge with all the	
4 THE COURT: You may continue your argument.		4 corrections. And we've run off copies for the jury later.	
5 MR. NORINSBERG: You can send a message through		5 Enjoy your lunch. I'll see you at 1:15.	
6 verdict, not just to these two Defendants, but to any other		6 (A lunch recess was taken.)	
7 police officer out there that thinks it's okay to get in front		7 (Continued on the next page.)	
8 of a grand jury and lie. You can send a message to any		8	
9 other police officer out there that thinks it's okay.		9	
10 THE COURT: Strike that reference to before the		10	
11 grand jury.		11	
12 MR. NORINSBERG: You can send a message to any other		12	
13 police officer that thinks it's okay to tell a prosecutor		13	
14 something that's completely false, and say, you know what, you		14	
15 can't do that. You actually cannot do that in our system.		15	
16 You will be accountable. And that's what we're going to ask		16	
17 you to do at the end of the day is listen to all of the		17	
18 evidence, work through it carefully. But if you do that and		18	
19 you honor the pledges you made in your jury selection, you're		19	
20 going to get the right result, and that's to hold these two		20	
21 Defendants responsible for putting this man in jail for four		21	
22 and a half months. Thank you.		22	
23 THE COURT: Thank you. Lunch will be up at 12:30.		23	
24 Do you want to take a break now, and then get back here at		24	
25 about quarter after one, take a break now? We'll continue at 25		25	
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PROCEEDINGS	95		96
1		1	is a long time to remember every single detail of what
2 (Honorable Jack B. Weinstein takes the bench.)		2	occurred. However, the evidence has shown that Officer
3 (Jury is in the courtroom at 1:20 p.m.)		3	Randall is consistent in the important facts of this case. He
4 THE COURT: Be seated, please. Proceed.		4	knows what he saw and he knows what he heard. He knows that
5 CLOSING STATEMENT BY THE DEFENSE		5	he saw the plaintiff pull an object out of his waistband, make
6 MS. CASTRO: Good afternoon, ladies and gentlemen.		6	a pitching motion, and he tossed it. He knows that he heard
7 JURORS: Good afternoon.		7	the sound of the metal cling on the ground. He said that that
8 MS. CASTRO: I want to start off by thanking you for		8	is the most unmistakable sound that he knows for a fact that
9 your careful attention that you paid throughout the course of		9	that's the sound of a gun hitting the ground. He's been
10 this trial. On behalf of my client, Police Officers Michael		10	consistent throughout his testimony in saying that.
11 Burbridge and Salim Randall, as well as my co-counsel, we		11	Now, the second reason he wants to attack Officer
12 would like to thank you for the careful attention that you		12	Randall's credibility is because of his paperwork, his arrest
13 will also give to your deliberations in deciding this case.		13	paperwork, to be specific. And he spent a lot of time harping
14 Now, I do have some remarks that I want to go		14	on the detail section of the arrest report. He wants you to
15 through and discuss our case, but I want to start off by		15	believe that that section was left blank, that was his word,
16 addressing some of the points that were made by plaintiff's		16	that was counsel's word, that he left that section blank, that
17 counsel in his summation a little while ago.		17	he didn't put any information about what happened.
18 Now, first off, with respect to Officer Randall,		18	Now, he didn't show you that paperwork during
19 plaintiff's counsel started off by trying to attack his		19	summation, but it was admitted into evidence and you're going
20 credibility. He wanted you to believe that he's not a		20	to have a chance to review it. Now, that arrest report is
21 credible witness and he gave you a few reasons for that. One		21	Plaintiff's Exhibit 6. And the detail section, if you look at
22 of the first reasons he gave you is because he says that there		22	it, says at TPO, which is time, place of occurrence, above
23 are inconsistencies in his testimony.		23	defendant named Joshua Marshall was found in the possession of
24 Now, as plaintiff's counsel went through and told		24	a loaded firearm, and it even specifies a serial number.
25 you repeatedly, this happened four years ago. Four years ago		25	That's not blank. That's a play on his words. And it's a
MARY AGNES DRURY, RPR - Official Court Reporter		MARY AGNES DRURY, RPR - Official Court Reporter	

A 1404

Case 1:10-cv-02714-JBW-VVP Document 71-1 Filed 04/26/12 Page 12 of 12 PageID #: 1091

PROCEEDINGS	129	PROCEEDINGS	130
1 Yes or no.		1 MS. SANDS: Your Honor --	
2 Did Officer Burbridge falsely arrest the plaintiff?		2 THE COURT: Do you wish to see me at the side bar?	
3 Yes or no.		3 MS. SANDS: I do.	
4 Did Officer Randall maliciously prosecute the		4 THE COURT: Come to the side bar.	
5 plaintiff? Yes or no.		5 (At the bench.)	
6 Did Officer Burbridge maliciously prosecute the		6 MS. SANDS: Your Honor, I think you misread the	
7 plaintiff? Yes or no.		7 question 3A.	
8 Did Officer Randall violate the plaintiff's		8 THE COURT: You're turning to page?	
9 constitutional right to a fair trial by knowingly presenting		9 MS. SANDS: Page 13, question 3A.	
10 false evidence to the prosecutor? I'm sorry, in preparation		10 (In open court.)	
11 for the grand jury.		11 THE COURT: 3A on Page 13 reads: Did Officer	
12 Did officer Burbridge violate plaintiff's		12 Randall violate plaintiff's constitutional right to a fair	
13 constitutional right to a fair trial by knowingly presenting		13 trial by knowingly presenting false evidence to the prosecutor	
14 false evidence to the prosecutor under similar circumstances?	14	14 under the circumstances I described? Yes or no.	
15 If your answers to all those questions is no, you		15 MS. SANDS: Okay.	
16 don't have to answer any of the following questions because		16 THE COURT: No other objections are made.	
17 there won't be any damages to assess. If you find that a		17 Swear the marshal, please.	
18 defendant is or has violated a right, then you'll determine		18 THE CLERK: Do you swear or affirm that you will	
19 compensatory damages first attributable to Officer Burbridge?	19	19 keep the jurors sworn in this cause together in some private	
20 second, attributable to Officer Randall. Then, if you find	20	20 and convenient place, that you shall suffer no one to speak to	
21 punitive damages, how much against Officer Burbridge --	21	21 them nor shall you speak to them unless it be at the direction	
22 Officer Randall, rather, and then against Officer Burbridge?	22	22 of the court to ask if they have agreed upon a verdict?	
23 Do any attorneys wish to see me at the side bar?	23	23 THE MARSHAL: I do.	
24 MR. NORINSBERG: No, your Honor.	24	24 THE COURT: Thank you.	
25 MS. CASTRO: No, your Honor.	25	25 Continue your deliberations until I tell you to	

JUDI JOHNSON, RPR, CRR, CLR - Official Court Reporter

JUDI JOHNSON, RPR, CRR, CLR - Official Court Reporter

PROCEEDINGS	131	PROCEEDINGS	132
1 stop. Now, if you want to go beyond 4:30 p.m., send in a		1 the list, please. Gather all of the exhibits. Nothing is to	
2 note.		2 go in until I go through it.	
3 (The jury exited.)		3 MR. COHEN: You have all the exhibits that we put	
4 THE COURT: The instructions I read from, which we		4 in.	
5 just distributed, is Court Exhibit 2, I think, of today's		5 THE COURT: Make up your list and put it all	
6 date. The brief is marked 1, and this jury charge I gave is		6 together.	
7 marked Exhibit 2.		7 I should say I appreciate the cooperation and fine	
8 (Court Exhibit 1 was received in evidence, as of		8 professional lawyering of both sides.	
9 this date.)		9 MS. GROSS: Thank you, your Honor.	
10 (Court Exhibit 2 was received in evidence, as of		10 MR. COHEN: Thank you, your Honor.	
11 this date.)		11 If I can make one request. Once the jury does have	
12 THE COURT: And we have prior drafts. There is	12	12 a verdict, we would like to speak to them.	
13 April 24th draft, which is marked Exhibit 3.	13	13 THE COURT: You're free to do so. It's up to them	
14 (Court Exhibit 3 was received in evidence, as of		14 whether they want to talk to you.	
15 this date.)		15 MR. COHEN: Can you just ask them if they want to	
16 THE COURT: There's an April 20th draft which is	16	16 stick around, to let them know that the attorneys would like	
17 marked 4.	17	17 to --	
18 (Court Exhibit 4 was received in evidence, as of		18 THE COURT: I will tell them. Yes, I will do that	
19 this date.)		19 MS. GROSS: Defendants join in that request.	
20 THE COURT: And there's an April 17th draft, which	20	20 THE COURT: I will do that.	
21 is marked 5.	21	21 (Recess.)	
22 (Court Exhibit 5 in evidence, was received as of		22 THE COURT: Yes, what can I do to help you?	
23 this date.)		23 MS. CASTRO: We've gathered all of the exhibits and	
24 THE COURT: Do you have a list of the witnesses,	24	24 created a witness list.	
25 please? Do you have a list of the exhibits, please? Make up	25	25 THE COURT: May I see the witness list, please.	

JUDI JOHNSON, RPR, CRR, CLR - Official Court Reporter

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A1405

COURT'S EXHIBIT 2
Jury Charge (Entered April 25, 2012)
(pp. A1405-A1419)

REPRODUCED FOLLOWING

A 1406

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JOSHUA MARSHALL,

Plaintiff,

– against –

SALIM RANDALL and MICHAEL
BURBRIDGE,

Defendants.

JURY CHARGE

10-CV-2714

JACK B. WEINSTEIN, Senior United States District Judge:

I. INTRODUCTION

Ladies and Gentlemen of the jury:

I will instruct you on the law. It is your duty to follow these instructions. My instructions will be in three parts.

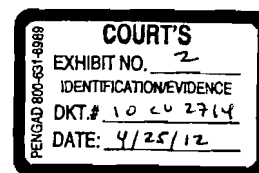
First, regarding the general rules that define and govern the duties of a jury in a civil case.

Second, as to the legal elements of the claims asserted by the plaintiff, I will provide the specific elements that the plaintiff must prove with respect to each of his claims to warrant a finding of liability on the part of a defendant. A discussion of damages is included.

Third, giving you some guidance regarding your deliberations.

Please read these instructions along with me. You may take them into the jury room.

You will have a list of documents and objects that were admitted into evidence. Ask for any of them or for a transcript of the testimony that you wish to see.



A 1407

II. GENERAL RULES

A. Role of the Court and of the Jury

You are the sole judges of the facts. Decide which of the witnesses you believe, what portion of their testimony you accept, and how much weight you give to it.

I have no view regarding the liability of any defendant. Nothing that I have said or done should be used by you to infer that I have such a view.

Your verdict must be based exclusively on the evidence or lack of evidence in the case and the law as I explain it to you. Do not consider any personal feelings that you may have about the race, religion, national origin, ethnic background, gender, or age of the plaintiff or a defendant. Do not do any research of your own, by computer or otherwise.

B. All Parties and Witnesses Equal

No party is entitled to any sympathy or favor. All parties are equal before this court. The fact that the defendants are police officers does not entitle them to any greater or lesser consideration than the plaintiff.

C. Claims and Burden of Proof

Whenever I say that a party has the burden of proof on a particular issue, I mean that, considering all of the evidence in the case, the party's claim on that issue must be established as more probably true than not true. If the probabilities are equal—that is, the scales are evenly balanced—the party has not met his burden.

The plaintiff makes three claims. First, that he was arrested by the defendants after the officers saw a gun thrown into the street, and that the arrest was illegal because the defendants falsely alleged that they saw him throw it, though they in fact did not know whose gun it was. Second, that criminal charges, based on fabricated evidence regarding the events leading to his

A 1408

arrest, were maliciously brought against him. Third, that one or both of the defendants violated his constitutional right to a fair trial by presenting false evidence to state prosecutors in order to procure an indictment.

Thus, the first issue is whether the plaintiff was falsely arrested by the defendants. The second issue is whether the plaintiff was maliciously prosecuted by the defendants. The third issue is whether the plaintiff was denied his constitutional right to a fair trial by the defendants. If and only if you decide one or more of these questions in the plaintiff's favor will you be required to consider the amount of damages to which the plaintiff is entitled.

The plaintiff has the burden of proving each element of his claims, except for the probable cause element of his false arrest claim. The burden is on a defendant to prove that he had probable cause to arrest the plaintiff.

D. Unanimity of Decision

Your decision on any issue must be unanimous. All of you must agree on the answer to questions on the verdict sheet that I will give you.

E. Evaluation of the Evidence

You will have a list of witnesses. Ask for a transcript of any part of the testimony that you wish to see. Try to be specific.

Communicate with me in writing to ask for any evidence, help on the law, or any other matter. Give a note with your question to the Marshal.

During the trial, objections were raised and rulings made. Draw no inferences from the frequency of objections or from whether objections were sustained or overruled. Where an objection to a question was sustained, disregard the question and draw no inferences from its wording. Where testimony was stricken, disregard it.

A 1409

On occasion, I gave limiting instructions on how evidence could be used. Follow those instructions.

Give the evidence such weight as you think it deserves. Analyze the evidence dispassionately, rationally, and without prejudice or emotion.

You may draw reasonable inferences from the evidence. Testimony from the witnesses and the exhibits are evidence. A lawyer's questions without an answer, arguments, and the opening and closing statements are not evidence.

F. Witnesses

1. General Principles

Decide which testimony to believe and which not to believe. Consider the following: each witness's demeanor and manner of testifying; his or her opportunity to see, hear, and know about the events he or she described; the witness's ability to recall and describe those things; the reasonableness of the testimony in light of all of the other evidence in the case; and the interest of a witness in the outcome of the trial. Consider whether part of a witness's testimony was contradicted or supported by other testimony, by what that witness said or did on a prior occasion, and by the testimony of other witnesses or by other evidence.

If you find that a witness has willfully testified falsely as to an important matter, you may disregard the entire testimony, or you may accept as much of the testimony as you find true and disregard what you find false. A witness may have been mistaken or may have lied with respect to part of his or her testimony while having been accurate or truthful with respect to other parts.

2. Testimony of Out-of-Court Declarants

You have heard evidence concerning what people outside the courtroom said about events. You are entitled to consider these statements as evidence. In evaluating these

A 1410

statements, remember that these individuals were not cross-examined before you when the statement was made. In considering the probative force of statements of individuals who have not testified, apply the same credibility tests that you apply with respect to individuals who have testified.

3. Testimony of Expert Witnesses

A person described as an expert is a witness who has acquired specialized knowledge by education, experience, or training. Such a witness is permitted to give an opinion and to give the reasons for it.

In weighing this testimony, you should consider the factors that generally bear upon the credibility of any witness, as well as the witness's education, training and experience, the soundness of the reasons given for the opinion, and all other evidence in the case. You should also consider whether the assumptions on which the witness relied were proven.

G. Judicial Notice

The court has taken judicial notice of certain facts or events. You shall accept these facts or events as evidence and regard as proven any fact or event that has been judicially noticed.

III. CLAIMS OF PLAINTIFF

Three claims are asserted by plaintiff under Section 1983 of Title 42 of the United States Code against police officers Salim Randall and Michael Burbridge.

Section 1983 provides a remedy for individuals who have been deprived of their constitutional rights by state or local officials acting under color of state law. It states that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subject, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured

A 1411

To make out a claim under Section 1983, the plaintiff must prove:

First, that the defendant officers acted intentionally or recklessly;

Second, that the conduct complained of was committed by a person acting under color of state law;

Third, that this conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States; and

Fourth, that the defendants' acts were a proximate cause of damages sustained by the plaintiff.

A. Intentional or Reckless Conduct

An act is intentional if it is done knowingly, that is, if it is done voluntarily and deliberately, and not because of mistake, accident, negligence, or other innocent reason. An act is reckless if it is done in conscious disregard of its known probable consequences.

B. Color of State Law

The defendants, as New York City police officers, were acting under color of state law when they arrested plaintiff. This element is deemed proven.

C. Deprivation of Constitutional Right

1. False Arrest

Plaintiff Marshall claims that defendants Randall and Burbridge falsely arrested him on May 15, 2008, in violation of the Fourth Amendment to the Constitution.

A person is falsely arrested when (1) the defendant intended to confine the plaintiff; (2) the plaintiff was conscious of the confinement; (3) the plaintiff did not consent to the confinement; and (4) the confinement was not privileged.

A 1412

The initial stop was lawful. Evidence relating to observations and acts surrounding the stop may be considered in deciding credibility.

The issue for you on this claim is whether the arrest was privileged, that is to say, whether there was probable cause for plaintiff's arrest. Defendants contend that there was probable cause to arrest the plaintiff for the illegal possession of a firearm. The plaintiff contends that there was no probable cause to arrest him for that crime. If there was an objectively reasonable ground for the officers' belief that a crime had been, or was being, committed by the plaintiff, then the arrest was privileged.

If one defendant had probable cause to arrest, then both defendants are deemed to have had probable cause. An officer may rely on information supplied to him by another officer who made observations at the scene.

The existence of probable cause is measured at the moment of arrest. You may consider as one piece of evidence, together with all of the evidence in the case, the fact that the charges against the plaintiff were later dismissed in determining whether probable cause to arrest existed.

The failure of an officer to make a further inquiry before making an arrest, when a reasonable person would have done so, may, but does not necessarily, show a lack of probable cause. An officer is not required to conduct a full investigation prior to executing an arrest. But he may not ignore relevant evidence that he is aware of, or deliberately disregard facts that he is aware of, if the evidence or facts tend to rebut the existence of probable cause to arrest.

The defendants have the burden of showing that probable cause existed for this arrest.

With regard to the substantive crimes on which plaintiff's arrest was premised, a person is guilty of the criminal possession of a weapon when he "possesses any firearm," except under limited circumstances not relevant here. *See* N.Y. Penal Law §§ 265.01(1), 265.20.

A 1413

2. Malicious Prosecution

Plaintiff Marshall claims that defendant Randall and defendant Burbridge maliciously prosecuted him by providing false statements to, and withholding relevant evidence that each was aware of, from a state prosecuting attorney. Plaintiff was indicted on three counts of the criminal possession of a weapon.

A defendant cannot be held liable for what he said to the grand jury; he may be held liable for what he said to the prosecutor if his statement was not in preparation for his grand jury testimony.

A person is maliciously prosecuted when (1) criminal proceedings are initiated or continued against him by the defendant; (2) the proceedings are terminated in his favor; (3) there was no probable cause for the commencement of the proceeding; and (4) a defendant's actions leading to the initiation of the proceeding against plaintiff were motivated by malice of the defendant.

There is no dispute that criminal proceedings were commenced and continued and that they ended in plaintiff's favor.

The critical decisions for you are whether there was probable cause for the initiation of the proceedings and whether a defendant's assistance in the initiation of the proceedings was motivated by malice.

Probable cause to prosecute exists when the facts and circumstances within the person's knowledge at the time he takes steps to proceed with the prosecution are sufficient for a person of reasonable prudence to believe that a violation of law was committed.

A 1414

A grand jury's indictment creates a presumption that probable cause for prosecution existed. You may find the presumption rebutted, that is, overcome, and that no probable cause for prosecution existed, based on all of the evidence.

The question here is whether either or both of the defendant officers believed that there was probable cause to initiate or assist in the prosecution of plaintiff.

A defendant initiates or continues a prosecution maliciously if he initiates or continues it for a wrongful purpose, that is, if his goal is not to bring an alleged offender to justice. For example, if he acts out of ill will or personal hostility towards a person accused, or he acts out of a desire to punish a person without due process, then he can be said to have acted with malice. You are permitted—but are not required—to infer that malice existed if you find that a defendant lacked probable cause to initiate and continue with the charges against the plaintiff.

If probable cause existed for Officers Randall and Burbridge to present the evidence they did to the state prosecuting attorney, then you must find for the defendants on this claim. If no probable cause existed, but the defendants did not act with malice, then you must find for the defendants on this claim.

3. Constitutional Right to a Fair Trial

Every person has a right not to be prosecuted on the basis of information that is known by the government to be false. The government's doing so violates the Constitution.

The question for you on this claim is whether the plaintiff has proven that the defendants knowingly created false evidence and presented it to the prosecutor, leading to a deprivation of the plaintiff's liberty. If a defendant presented accurate evidence to the prosecutor, or presented false evidence thinking it was true, then you must find for the defendant.

A 1415

D. Proximate Cause

The third element that plaintiff must prove is that the acts of Officer Randall and Officer Burbridge were a proximate cause of injuries he sustained.

There can be more than one proximate cause. An injury or damage is proximately caused by an act or failure to act whenever the act or omission played a substantial part in bringing about or actually causing the injury or damage, and that injury was the direct or a reasonably probable consequence of the act or omission. To recover damages, Marshall has the burden of proving that he suffered an injury and that the injury would not have occurred without the wrongful conduct of the defendant.

IV. DAMAGES

If the plaintiff has proven liability on a claim, you must determine the damages, if any, that he has proven on that claim. Do not infer that he is entitled to recover damages merely because I am instructing you on this issue. It is exclusively your function to decide upon liability.

A. Compensatory Damages

If liability is proven on a claim, you must award the plaintiff sufficient damages against the defendants to compensate him for any injury proximately caused by Officer Randall and Officer Burbridge's actions that created the liability. Damages of this type are known as compensatory damages. Their purpose is to make a plaintiff whole.

The compensatory damages you award, if any, should be fair and reasonable, neither inadequate nor excessive. You should award damages only for injuries the plaintiff has suffered or is reasonably likely to suffer as a proximate result of the claimed injury.

A 1416

Plaintiff claims as the injury that he spent four and a half months in jail. He is not seeking recovery for any emotional or psychological injuries. He is not seeking recovery for loss of earnings.

In awarding compensatory damages, you must be guided by dispassionate common sense. Use as much definiteness and accuracy as the circumstances permit.

Each defendant is entitled to fair, separate, and individual consideration. If you find that only one is responsible for a particular injury, then you must impose damages, if any, for that injury only upon that defendant.

B. Punitive Damages

If you award compensatory damages, you may award additional punitive damages if you find that a defendant engaged in extraordinary misconduct. You may do so to express your disapproval and to serve as an example or warning to others who might otherwise engage in similar conduct.

If you find in favor of plaintiff and against a defendant, and if you find that the defendant acted so maliciously, wantonly, or oppressively as to warrant an award of punitive damages, you may make such an award. To justify an award of punitive damages, a defendant's misconduct must be based upon a reckless or callous disregard of the rights of the plaintiff, or a gross indifference towards them; you may also award punitive damages if a defendant acted to punish the plaintiff out of ill will or spite.

You may assess punitive damages against either or both of the defendants, or you may refuse to impose punitive damages at all. If punitive damages are assessed against more than one defendant, the amounts assessed against each defendant may be the same, or they may be different.

A 1417

V. CONCLUDING REMARKS

Do not communicate with anyone outside the jury room except the court about your deliberations, or about anything else regarding this case. You may send a note to me, signed by your foreperson, through the Marshal to ask for help on the law or for any other assistance.

Discuss the issues with respect for each other. Do not hesitate to change your mind after considering each matter. Each of you is individually responsible for your vote.

If you are divided, do not report how the vote stands. If you have reached a verdict, do not report what it is to anyone until you are asked in open court. Inform the court when you have reached a verdict; do not inform me what your verdict is.

Render your verdict without fear, without favor, without prejudice, and without sympathy.

A 1418

VERDICT SHEET

(Page 1 of 2)

1A. Did Officer Randall falsely arrest the plaintiff on May 15, 2008?

YES	NO

1B. Did Officer Burbridge falsely arrest the plaintiff on May 15, 2008?

YES	NO

2A. Did Officer Randall maliciously prosecute the plaintiff?

YES	NO

2B. Did Officer Burbridge maliciously prosecute the plaintiff?

YES	NO

3A. Did Officer Randall violate plaintiff's constitutional right to a fair trial by knowingly presenting false evidence to the prosecutor?

YES	NO

A 1419

(Page 2 of 2)

3B. Did Officer Burbridge violate plaintiff's constitutional right to a fair trial by knowingly presenting false evidence to the prosecutor?

YES	NO

If you answer all of the above questions "No", do not continue to the following questions. If you answer one or more of the above questions "Yes", continue to the following questions.

4A. What amount of money, if any, is necessary to compensate the plaintiff for his injuries proximately caused by a violation of one or more of his rights by Officer Randall?

COMPENSATORY DAMAGES	\$
----------------------	----

4B. What amount of money, if any, is necessary to compensate the plaintiff for his injuries proximately caused by a violation of one or more of his rights by Officer Burbridge?

COMPENSATORY DAMAGES	\$
----------------------	----

5A. If damages are awarded pursuant to question 4A, and the plaintiff is entitled to punitive damages from Officer Randall, what amount of punitive damages for breach of plaintiff's constitutional rights is awarded from Officer Randall?

PUNITIVE DAMAGES	\$
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5B. If damages are awarded pursuant to question 4B, and the plaintiff is entitled to punitive damages from Officer Burbridge, what amount of punitive damages for breach of plaintiff's constitutional rights is awarded from Officer Burbridge?

PUNITIVE DAMAGES	\$
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A1420

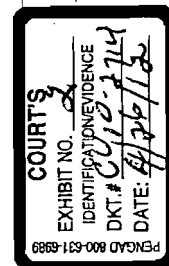
COURT'S EXHIBIT 2
Jury Note (Entered April 26, 2012)
(pp. A1420-A1421)

REPRODUCED FOLLOWING

A 1421

WE HAVE REACH
A VERDICT.

[Signature]



A1422

COURT'S EXHIBIT 3
Superseded Jury Charge
(pp. A1422-A1436)

REPRODUCED FOLLOWING

A 1423

3

~~DRAFT: APRIL 24, 2012~~

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

~~PROPOSED~~ JURY CHARGE

JOSHUA MARSHALL,

Plaintiff,

10-CV-2714

– against –

~~P.O. SALIM RANDALL, Shield No. 15331,
Individually and in His Official Capacity, P.O.
MICHAEL BURBRIDGE, Shield No. 15488,
Individually and in His Official Capacity.~~

Defendants.

JACK B. WEINSTEIN, Senior United States District Judge:

I. INTRODUCTION

Ladies and Gentlemen of the jury:

I will instruct you on the law. It is your duty to follow these instructions. My instructions will be in three parts.

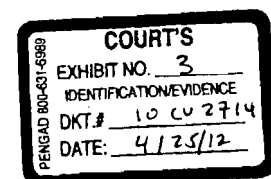
First, regarding the general rules that define and govern the duties of a jury in a civil case.

Second, as to the legal elements of the claims asserted by the plaintiff, I will provide the specific elements that the plaintiff must prove with respect to each of his claims to warrant a finding of liability on the part of a defendant. A discussion of damages is included.

Third, giving you some guidance regarding your deliberations.

Please read these instructions along with me. You may take them into the jury room.

You will have a list of documents and objects that were admitted into evidence. Ask for any of them or for a transcript of the testimony that you wish to see.



A 1424

II. GENERAL RULES

A. Role of the Court and of the Jury

You are the sole judges of the facts. Decide which of the witnesses you believe, what portion of their testimony you accept, and how much weight you give to it.

I have no view regarding the liability of any defendant. Nothing that I have said or done should be used by you to infer that I have such a view.

Your verdict must be based exclusively on the evidence or lack of evidence in the case and the law as I explain it to you. Do not consider any personal feelings that you may have about the race, religion, national origin, ethnic background, gender, or age of the plaintiff or a defendant. Do not do any research of your own, by computer or otherwise.

B. All Parties and Witnesses Equal

No party is entitled to any sympathy or favor. All parties are equal before this court. The fact that the defendants are police officers does not entitle them to any greater or lesser consideration than the plaintiff.

C. Claims and Burden of Proof

Whenever I say that a party has the burden of proof on a particular issue, I mean that, considering all of the evidence in the case, the party's claim on that issue must be established as more probably true than not true. If the probabilities are equal—that is, the scales are evenly balanced—the party has not met his burden.

The plaintiff makes three claims. First, that he was arrested by the defendants after the officers saw a gun thrown into the street, and that the arrest was illegal because the defendants falsely alleged that they saw him throw it, though they in fact did not know whose gun it was. Second, that criminal charges, based on fabricated evidence regarding the events leading to his

A 1425

arrest, were maliciously brought against him. Third, that one or both of the defendants violated his constitutional right to a fair trial by presenting false evidence to state prosecutors in order to procure an indictment.

Thus, the first issue is whether the plaintiff was falsely arrested by the defendants. The second issue is whether the plaintiff was maliciously prosecuted by the defendants. The third issue is whether the plaintiff was denied his constitutional right to a fair trial by the defendants. If and only if you decide one or more of these questions in the plaintiff's favor will you be required to consider the amount of damages to which the plaintiff is entitled.

The plaintiff has the burden of proving each element of his claims, except for the probable cause element of his false arrest claim. The burden is on a defendant to prove that he had probable cause to arrest the plaintiff.

D. Unanimity of Decision

Your decision on any issue must be unanimous. All of you must agree on the answer to questions on the verdict sheet that I will give you.

E. Evaluation of the Evidence

You will have a list of witnesses. Ask for a transcript of any part of the testimony that you wish to see. Try to be specific.

Communicate with me in writing to ask for any evidence, help on the law, or any other matter. Give a note with your question to the Marshal.

During the trial, objections were raised and rulings made. Draw no inferences from the frequency of objections or from whether objections were sustained or overruled. Where an objection to a question was sustained, disregard the question and draw no inferences from its wording. Where testimony was stricken, disregard it.

A 1426

On occasion, I gave limiting instructions on how evidence could be used. Follow those instructions.

Give the evidence such weight as you think it deserves. Analyze the evidence dispassionately, rationally, and without prejudice or emotion.

You may draw reasonable inferences from the evidence. Testimony from the witnesses and the exhibits are evidence. A lawyer's questions without an answer, arguments, and the opening and closing statements are not evidence.

F. Witnesses

1. General Principles

Decide which testimony to believe and which not to believe. Consider the following: each witness's demeanor and manner of testifying; his or her opportunity to see, hear, and know about the events he or she described; the witness's ability to recall and describe those things; the reasonableness of the testimony in light of all of the other evidence in the case; and the interest of a witness in the outcome of the trial. Consider whether part of a witness's testimony was contradicted or supported by other testimony, by what that witness said or did on a prior occasion, and by the testimony of other witnesses or by other evidence.

If you find that a witness has willfully testified falsely as to an important matter, you may disregard the entire testimony, or you may accept as much of the testimony as you find true and disregard what you find false. A witness may have been mistaken or may have lied with respect to part of his or her testimony while having been accurate or truthful with respect to other parts.

2. Testimony of Out-of-Court Declarants

You have heard evidence concerning what people outside the courtroom said about events. You are entitled to consider these statements as evidence. In evaluating these

A 1427

statements, remember that these individuals were not cross-examined before you when the statement was made. In considering the probative force of statements of individuals who have not testified, apply the same credibility tests that you apply with respect to individuals who have testified.

3. Testimony of Expert Witnesses

A person described as an expert is a witness who has acquired specialized knowledge by education, experience, or training. Such a witness is permitted to give an opinion and to give the reasons for it.

In weighing this testimony, you should consider the factors that generally bear upon the credibility of any witness, as well as the witness's education, training and experience, the soundness of the reasons given for the opinion, and all other evidence in the case. You should also consider whether the assumptions on which the witness relied were proven.

G. Judicial Notice

The court has taken judicial notice of certain facts or events. You shall accept these facts or events as evidence and regard as proven any fact or event that has been judicially noticed.

III. CLAIMS OF PLAINTIFF

Three claims are asserted by plaintiff under Section 1983 of Title 42 of the United States Code against police officers Salim Randall and Michael Burbridge.

Section 1983 provides a remedy for individuals who have been deprived of their constitutional rights by state or local officials acting under color of state law. It states that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subject, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . .

A 1428

To make out a claim under Section 1983, the plaintiff must prove:

First, that the defendant officers acted intentionally or recklessly;

Second, that the conduct complained of was committed by a person acting under color of state law;

Third, that this conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States; and

Fourth, that the defendants' acts were a proximate cause of damages sustained by the plaintiff.

A. Intentional or Reckless Conduct

An act is intentional if it is done knowingly, that is, if it is done voluntarily and deliberately, and not because of mistake, accident, negligence, or other innocent reason. An act is reckless if it is done in conscious disregard of its known probable consequences.

B. Color of State Law

The defendants, as New York City police officers, were acting under color of state law when they arrested plaintiff. This element is deemed proven.

C. Deprivation of Constitutional Right

1. False Arrest

Plaintiff Marshall claims that defendants Randall and Burbridge falsely arrested him on May 15, 2008, in violation of the Fourth Amendment to the Constitution.

A person is falsely arrested when (1) the defendant intended to confine the plaintiff; (2) the plaintiff was conscious of the confinement; (3) the plaintiff did not consent to the confinement; and (4) the confinement was not privileged.

A 1429

IP
The initial stop was lawful. Evidence relating to observations and acts surrounding the stop may be considered in deciding

The issue for you on this claim is whether the arrest was privileged, that is to say, *credibility*. whether there was probable cause for plaintiff's arrest. Defendants contend that there was probable cause to arrest the plaintiff for the illegal possession of a firearm. The plaintiff contends that there was no probable cause to arrest him for that crime. If there was an objectively reasonable ground for the officers' belief that a crime had been, or was being, committed by the plaintiff, then the arrest was privileged.

If one defendant had probable cause to arrest, then both defendants are deemed to have had probable cause. An officer may rely on information supplied to him by another officer who made observations at the scene.

The existence of probable cause is measured at the moment of arrest. You may consider as one piece of evidence, together with all of the evidence in the case, the fact that the charges against the plaintiff were later dismissed in determining whether probable cause to arrest existed.

The failure of an officer to make a further inquiry before making an arrest, when a reasonable person would have done so, may, but does not necessarily, show a lack of probable cause. An officer is not required to conduct a full investigation prior to executing an arrest. But he may not ignore relevant evidence that he is aware of, or deliberately disregard facts that he is aware of, if the evidence or facts tend to rebut the existence of probable cause to arrest.

The defendants have the burden of showing that probable cause existed for this arrest.

With regard to the substantive crimes on which plaintiff's arrest was premised, a person is guilty of the criminal possession of a weapon when he "possesses any firearm," except under limited circumstances not relevant here. *See* N.Y. Penal Law §§ 265.01(1), 265.20.

A 1430

2. Malicious Prosecution

Plaintiff Marshall claims that defendant Randall and defendant Burbridge maliciously prosecuted him by providing false statements to, and withholding relevant evidence that each was aware of, from a state prosecuting attorney. Plaintiff was indicted on three counts of the criminal possession of a weapon.

A defendant cannot be held liable for what he said to the grand jury; he may be held liable for what he said to the prosecutor if his statement was not in preparation for his grand jury testimony.

A person is maliciously prosecuted when (1) criminal proceedings are initiated or continued against him by the defendant; (2) the proceedings are terminated in his favor; (3) there was no probable cause for the commencement of the proceeding; and (4) a defendant's actions leading to the initiation of the proceeding against plaintiff were motivated by malice of the defendant.

There is no dispute that criminal proceedings were commenced and continued and that they ended in plaintiff's favor.

The critical decisions for you are whether there was probable cause for the initiation of the proceedings and whether a defendant's assistance in the initiation of the proceedings was motivated by malice.

Probable cause to prosecute exists when the facts and circumstances within the person's knowledge at the time he takes steps to proceed with the prosecution are sufficient for a person of reasonable prudence to believe that a violation of law was committed.

The question here is whether either or both of the defendant officers believed that there was probable cause to initiate or assist in the prosecution of plaintiff.

the presumption

P/ A grand jury's indictment creates a presumption that probable cause for prosecution existed. You may find it rebutted, but in prosecution existed, based on all

A 1431

A defendant initiates or continues a prosecution maliciously if he initiates or continues it for a wrongful purpose, that is, if his goal is not to bring an alleged offender to justice. For example, if he acts out of ill will or personal hostility towards a person accused, or he acts out of a desire to punish a person without due process, then he can be said to have acted with malice. You are permitted—but are not required—to infer that malice existed if you find that a defendant lacked probable cause to initiate and continue with the charges against the plaintiff.

If probable cause existed for Officers Randall and Burbridge to present the evidence they did to the state prosecuting attorney, then you must find for the defendants on this claim. If no probable cause existed, but the defendants did not act with malice, then you must find for the defendants on this claim.

3. Constitutional Right to a Fair Trial

Every person has a right not to be prosecuted on the basis of information that is known by the government to be false. The government's doing so violates the Constitution.

The question for you on this claim is whether the plaintiff has proven that the defendants knowingly created false evidence and presented it to the prosecutor, leading to a deprivation of the plaintiff's liberty. If a defendant presented accurate evidence to the prosecutor, or presented ~~inaccurate evidence without the requisite intent~~, then you must find for the defendant.

D. Proximate Cause

The third element that plaintiff must prove is that the acts of Officer Randall and Officer Burbridge were a proximate cause of injuries he sustained.

There can be more than one proximate cause. An injury or damage is proximately caused by an act or failure to act whenever the act or omission played a substantial part in bringing about or actually causing the injury or damage, and that injury was the direct or a reasonably

A 1432

probable consequence of the act or omission. To recover damages, Marshall has the burden of proving that he suffered an injury and that the injury would not have occurred without the wrongful conduct of the defendant.

IV. DAMAGES

If the plaintiff has proven liability on a claim, you must determine the damages, if any, that he has proven on that claim. Do not infer that he is entitled to recover damages merely because I am instructing you on this issue. It is exclusively your function to decide upon liability.

A. Compensatory Damages

If liability is proven on a claim, you must award the plaintiff sufficient damages against the defendants to compensate him for any injury proximately caused by Officer Randall and Officer Burbidge's actions that created the liability. Damages of this type are known as compensatory damages. Their purpose is to make a plaintiff whole.

The compensatory damages you award, if any, should be fair and reasonable, neither inadequate nor excessive. You should award damages only for injuries the plaintiff has suffered or is reasonably likely to suffer as a proximate result of the claimed injury.

Plaintiff claims as the injury that he spent four and a half months in jail. *He is not seeking a recovery for any emotional or psychological injuries.*

In awarding compensatory damages, you must be guided by dispassionate common *He is not seeking loss of earnings.*
sense. Use as much definiteness and accuracy as the circumstances permit.

Each defendant is entitled to fair, separate, and individual consideration. If you find that *earnings.*
only one is responsible for a particular injury, then you must impose damages, if any, for that injury only upon that defendant.

A 1433

B. Punitive Damages

If you award compensatory damages, you may award additional punitive damages if you find that a defendant engaged in extraordinary misconduct. You may do so to express your disapproval and to serve as an example or warning to others who might otherwise engage in similar conduct.

If you find in favor of plaintiff and against a defendant, and if you find that the defendant acted so maliciously, wantonly, or oppressively as to warrant an award of punitive damages, you may make such an award. To justify an award of punitive damages, a defendant's misconduct must be based upon a reckless or callous disregard of the rights of the plaintiff, or a gross indifference towards them; you may also award punitive damages if a defendant acted to punish the plaintiff out of ill will or spite.

You may assess punitive damages against either or both of the defendants, or you may refuse to impose punitive damages at all. If punitive damages are assessed against more than one defendant, the amounts assessed against each defendant may be the same, or they may be different.

V. CONCLUDING REMARKS

Do not communicate with anyone outside the jury room except the court about your deliberations, or about anything else regarding this case. You may send a note to me, signed by your foreperson, through the Marshal to ask for help on the law or for any other assistance.

Discuss the issues with respect for each other. Do not hesitate to change your mind after considering each matter. Each of you is individually responsible for your vote.

A 1434

If you are divided, do not report how the vote stands. If you have reached a verdict, do not report what it is to anyone until you are asked in open court. Inform the court when you have reached a verdict; do not inform me what your verdict is.

Render your verdict without fear, without favor, without prejudice, and without sympathy.

A 1435

VERDICT SHEET

(Page 1 of 2)

1A. Did Officer Randall falsely arrest the plaintiff on May 15, 2008?

YES	NO

1B. Did Officer Burbridge falsely arrest the plaintiff on May 15, 2008?

YES	NO

2A. Did Officer Randall maliciously prosecute the plaintiff?

YES	NO

2B. Did Officer Burbridge maliciously prosecute the plaintiff?

YES	NO

3A. Did Officer Randall violate plaintiff's constitutional right to a fair trial by knowingly presenting false evidence to the prosecutor?

YES	NO

A 1436

(Page 2 of 2)

3B. Did Officer Burbridge violate plaintiff's constitutional right to a fair trial by knowingly presenting false evidence to the prosecutor?

YES	NO

If you answer all of the above questions ^{in "No"} ~~in the negative~~, do not continue to the following questions. If you answer one or more of the above questions ~~in the affirmative~~, continue to the following questions. ^{Yes}

4A. What amount of money, if any, is necessary to compensate the plaintiff for his injuries proximately caused by a violation of one or more of his rights by Officer Randall?

COMPENSATORY DAMAGES	\$
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4B. What amount of money, if any, is necessary to compensate the plaintiff for his injuries proximately caused by a violation of one or more of his rights by Officer Burbridge?

COMPENSATORY DAMAGES	\$
----------------------	----

5A. If damages are awarded pursuant to question 4A, and the plaintiff is ^{amount of} entitled to punitive damages from Officer Randall, what ^{amount of} punitive damages for breach of plaintiff's constitutional rights ~~are~~ awarded from Officer Randall? ^{is}

PUNITIVE DAMAGES	\$
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5B. If damages are awarded pursuant to question 4B, and the plaintiff is ^{amount of} entitled to punitive damages from Officer Burbridge, what ^{amount of} punitive damages for breach of plaintiff's constitutional rights are awarded from Officer Burbridge?

PUNITIVE DAMAGES	\$
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A1437

COURT EXHIBIT 4

Proposed Jury Charge, Dated April 20, 2012
(pp. A1437-A1451)

REPRODUCED FOLLOWING

A 1438

J B W
(4)

DRAFT: APRIL 20, 2012

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PROPOSED JURY CHARGE

JOSHUA MARSHALL,

Plaintiff,

– against –

10-CV-2714

~~THE CITY OF NEW YORK~~ P.O. SALIM
RANDALL, Shield No. 15331, Individually
and in His Official Capacity, P.O. MICHAEL
BURBRIDGE, Shield No. 15488, Individually
and in His Official Capacity, and P.O.'s
"JOHN DOE" #1-10, Individually and in their
Official Capacities, (the name John Doe being
fictitious, as their true names are presently
unknown),

Defendants.

JACK B. WEINSTEIN, Senior United States District Judge:

I. INTRODUCTION

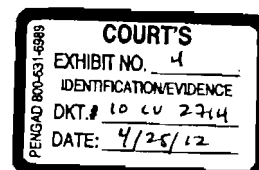
Ladies and Gentlemen of the jury:

I will instruct you on the law. It is your duty to follow these instructions. My instructions will be in three parts.

First, regarding the general rules that define and govern the duties of a jury in a civil case.

Second, as to the legal elements of the claims asserted by the plaintiff, I will provide the specific elements that the plaintiff must prove with respect to each of his claims to warrant a finding of liability on the part of a defendant. A discussion of damages is included.

Third, giving you some guidance regarding your deliberations.



A 1439

Please read these instructions along with me. You may take them into the jury room.

You will have a list of documents and objects that were admitted into evidence. Ask for any of them or for a transcript of the testimony that you wish to see.

II. GENERAL RULES

A. Role of the Court and of the Jury

You are the sole judges of the facts. Decide which of the witnesses you believe, what portion of their testimony you accept, and how much weight you give to it.

I have no view regarding the liability of any defendant. Nothing that I have said or done should be used by you to infer that I have such a view.

Your verdict must be based exclusively on the evidence or lack of evidence in the case and the law as I explain it to you. Do not consider any personal feelings that you may have about the race, religion, national origin, ethnic background, gender, or age of the plaintiff or a defendant. Do not do any research of your own, by computer or otherwise.

B. All Parties and Witnesses Equal

No party is entitled to any sympathy or favor. All parties are equal before this court. The fact that the defendants are police officers does not entitle them to any greater or lesser consideration than the plaintiff.

C. Claims and Burden of Proof

Whenever I say that a party has the burden of proof on a particular issue, I mean that, considering all of the evidence in the case, the party's claim on that issue must be established as more probably true than not true. If the probabilities are equal—that is, the scales are evenly balanced—the party has not met his burden.

A 1440

The plaintiff makes three claims. First, that he was arrested by the defendants after the officers saw a gun thrown into the street, and that the arrest was illegal because the defendants falsely alleged that they saw him throw it, though they in fact did not know whose gun it was. Second, that criminal charges, based on fabricated evidence regarding the events leading to his arrest, were maliciously brought against him. Third, that one or both of the defendants violated his constitutional right to a fair trial by presenting false evidence to state prosecutors in order to procure an indictment.

Thus, the first issue is whether the plaintiff was falsely arrested by the defendants. The second issue is whether the plaintiff was maliciously prosecuted by the defendants. The third issue is whether the plaintiff was denied his constitutional right to a fair trial by the defendants. If and only if you decide one or more of these questions in the plaintiff's favor will you be required to consider the amount of damages to which the plaintiff is entitled.

The plaintiff has the burden of proving each element of his claims, except for the probable cause element of his false arrest claim. The burden is on a defendant to prove that he had probable cause to arrest the plaintiff.

D. Unanimity of Decision

Your decision on any issue must be unanimous. All of you must agree on the answer to questions on the verdict sheet that I will give you.

E. Evaluation of the Evidence

You will have a list of witnesses. Ask for a transcript of any part of the testimony that you wish to see. Try to be specific.

Communicate with me in writing to ask for any evidence, help on the law, or any other matter. Give a note with your question to the Marshal.

A 1441

During the trial, objections were raised and rulings made. Draw no inferences from the frequency of objections or from whether objections were sustained or overruled. Where an objection to a question was sustained, disregard the question and draw no inferences from its wording. Where testimony was stricken, disregard it.

On occasion, I gave limiting instructions on how evidence could be used. Follow those instructions.

Give the evidence such weight as you think it deserves. Analyze the evidence dispassionately, rationally, and without prejudice or emotion.

You may draw reasonable inferences from the evidence. Testimony from the witnesses and the exhibits are evidence. A lawyer's questions without an answer, arguments, and the opening and closing statements are not evidence.

F. Witnesses

1. General Principles

Decide which testimony to believe and which not to believe. Consider the following: each witness's demeanor and manner of testifying; his or her opportunity to see, hear, and know about the events he or she described; the witness's ability to recall and describe those things; the reasonableness of the testimony in light of all of the other evidence in the case; and the interest of a witness in the outcome of the trial. Consider whether part of a witness's testimony was contradicted or supported by other testimony, by what that witness said or did on a prior occasion, and by the testimony of other witnesses or by other evidence.

If you find that a witness has willfully testified falsely as to an important matter, you may disregard the entire testimony, or you may accept as much of the testimony as you find true and

A 1442

disregard what you find false. A witness may have been mistaken or may have lied with respect to part of his or her testimony while having been accurate or truthful with respect to other parts.

2. Testimony of Out-of-Court Declarants

You have heard evidence concerning what people outside the courtroom said about events. You are entitled to consider these statements as evidence. In evaluating these statements, remember that these individuals were not cross-examined before you when the statement was made. In considering the probative force of statements of individuals who have not testified, apply the same credibility tests that you apply with respect to individuals who have testified.

3. Testimony of Expert Witnesses

A person described as an expert is a witness who has acquired specialized knowledge by education, experience, or training. Such a witness is permitted to give an opinion and to give the reasons for it.

In weighing this testimony, you should consider the factors that generally bear upon the credibility of any witness, as well as the witness's education, training and experience, the soundness of the reasons given for the opinion, and all other evidence in the case. You should also consider whether the assumptions on which the witness relied were proven.

G. Judicial Notice

The court has taken judicial notice of certain facts or events. You shall accept these facts or events as evidence and regard as proven any fact or event that has been judicially noticed.

III. CLAIMS OF PLAINTIFF

Three claims are asserted by plaintiff under Section 1983 of Title 42 of the United States Code against police officers Salim Randall and Michael Burbridge.

A 1443

Section 1983 provides a remedy for individuals who have been deprived of their constitutional rights by state or local officials acting under color of state law. It states that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subject, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured

To make out a claim under Section 1983, the plaintiff must prove:

First, that the defendant officers acted intentionally or recklessly;

Second, that the conduct complained of was committed by a person acting under color of state law;

Third, that this conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States; and

Fourth, that the defendants' acts were a proximate cause of damages sustained by the plaintiff.

A. Intentional or Reckless Conduct

An act is intentional if it is done knowingly, that is, if it is done voluntarily and deliberately, and not because of mistake, accident, negligence, or other innocent reason. An act is reckless if it is done in conscious disregard of its known probable consequences.

B. Color of State Law

The defendants, as New York City police officers, were acting under color of state law when they arrested plaintiff. This element is deemed proven.

A 1444

C. Deprivation of Constitutional Right1. False Arrest

Plaintiff Marshall claims that defendants Randall and Burbridge falsely arrested him on May 15, 2008, in violation of the Fourth Amendment to the Constitution.

A person is falsely arrested when (1) the defendant intended to confine the plaintiff; (2) the plaintiff was conscious of the confinement; (3) the plaintiff did not consent to the confinement; and (4) the confinement was not privileged.

The issue for you on this claim is whether the arrest was privileged, that is to say, whether there was probable cause for plaintiff's arrest. Defendants contend that there was probable cause to arrest the plaintiff for the illegal possession of a firearm. The plaintiff contends that there was no probable cause to arrest him for that crime. If there was an objectively reasonable ground for the officers' belief that a crime had been, or was being, committed by the plaintiff, then the arrest was privileged.

If one defendant had probable cause to arrest, then both defendants are deemed to have had probable cause. *An officer may rely on information supplied to him by another officer who made observations at the scene.*
 The existence of probable cause is measured at the moment of arrest. *However, you are permitted to consider the fact that the charges against the plaintiff were later dismissed in determining whether probable cause to arrest existed.* *as one piece of evidence, together with all the evidence in the case, may*

The failure of an officer to make a further inquiry before making an arrest, when a reasonable person would have done so, may, but does not necessarily, show a lack of probable cause. An officer is not required to conduct a full investigation prior to executing an arrest. But he may not ignore relevant evidence that he is aware of, or deliberately disregard facts he is aware of, that tend to rebut the existence of probable cause to arrest.

A 1445

P/A Defendants can not be held liable for what he they said to the grand jury; they may be held liable for what they he said to the prosecutor, the district attorney.

The defendants have the burden of showing that probable cause existed for this arrest.

With regard to the substantive crimes on which plaintiff's arrest was premised, a person is guilty of the criminal possession of a weapon when he "possesses any firearm," except under limited circumstances not relevant here. See N.Y. Penal Law §§ 265.01(1), 265.20.

2. Malicious Prosecution

Plaintiff Marshall claims that defendant Randall and defendant Burbridge maliciously prosecuted him by providing false statements to, and withholding relevant evidence that each was aware of, from a state prosecuting attorney. Plaintiff was indicted ^{on} by a grand jury of three counts of the criminal possession of a weapon.

A person is maliciously prosecuted when (1) criminal proceedings are initiated or continued against him by the defendant; (2) the proceedings are terminated in his favor; (3) there was no probable cause for the commencement of the proceeding; and (4) a defendant's actions leading to the initiation of the proceeding against plaintiff were motivated by malice of the defendant.

There is no dispute that criminal proceedings were commenced and continued by the defendants against the plaintiff and that they ended in ^{plaintiff's} favor. The charges against Marshall were dismissed in May 2009 ~~for a violation of speedy trial grounds.~~

The critical decisions for you are whether there was probable cause for the initiation of the proceedings and whether a defendant's assistance in the initiation of the proceedings was motivated by malice.

Probable cause to prosecute exists when the facts and circumstances within the person's knowledge at the time he takes steps to proceed with the prosecution are sufficient for a person of reasonable prudence to believe that a violation of law was committed.

A 1446

The question here is whether either or both of the defendant officers believed that there was probable cause to initiate or assist in the prosecution of plaintiff.

A defendant initiates or continues a prosecution maliciously if he initiates or continues it for a wrongful purpose, that is, if his goal is not to bring an alleged offender to justice. For example, if he acts out of ill will or personal hostility towards a person accused, or he acts out of a desire to punish a person without due process, then he can be said to have acted with malice. You are permitted—but are not required—to infer that malice existed if you find that a defendant lacked probable cause to initiate and continue with the charges against the plaintiff.

If probable cause existed for Officers Randall and Burbridge to present the evidence they did to the state prosecuting attorney, then you must find for the defendants on this claim. If no probable cause existed, but the defendants did not act with malice, then you must find for the defendants on this claim.

3. Constitutional Right to a Fair Trial

Every person has a right not to be prosecuted on the basis of information that is known by the government to be false. The government's doing so violates the Constitution.

The question for you on this claim is whether the plaintiff has proven that the defendants knowingly created false evidence and presented it to the prosecutor, leading to a deprivation of the plaintiff's liberty. If a defendant presented accurate evidence to the prosecutor, or presented inaccurate evidence without the requisite intent, then you must find for the defendant.

D. Proximate Cause

The third element that plaintiff must prove is that the acts of Officer Randall and Officer Burbridge were a proximate cause of injuries he sustained.

A 1447

There can be more than one proximate cause. An injury or damage is proximately caused by an act or failure to act whenever the act or omission played a substantial part in bringing about or actually causing the injury or damage, and that injury was the direct or a reasonably probable consequence of the act or omission. To recover damages, Marshall has the burden of proving that he suffered an injury and that the injury would not have occurred without the wrongful conduct of the defendant.

IV. DAMAGES

If the plaintiff has proven liability on a claim, you must determine the damages, if any, that he has proven on that claim. Do not infer that he is entitled to recover damages merely because I am instructing you on this issue. It is exclusively your function to decide upon liability.

A. Compensatory Damages

If liability is proven on a claim, you must award the plaintiff sufficient damages against the defendants to compensate him for any injury proximately caused by Officer Randall and Officer Burbridge's actions that created the liability. Damages of this type are known as compensatory damages. Their purpose is to make a plaintiff whole.

The compensatory damages you award, if any, should be fair and reasonable, neither inadequate nor excessive. You should award damages only for injuries the plaintiff has suffered or is reasonably likely to suffer as a proximate result of the claimed injury.

In awarding compensatory damages, you must be guided by dispassionate common sense. Use as much definiteness and accuracy as the circumstances permit.

TP/ Plaintiff claims as the injury that he ^{spent} ~~spent~~ four and a half months in jail.

A 1448

Each defendant is entitled to fair, separate, and individual consideration. If you find that only one is responsible for a particular injury, then you must impose damages, if any, for that injury only upon that defendant.

B. Punitive Damages

If you award compensatory damages, you may award additional punitive damages if you find that a defendant engaged in extraordinary misconduct. You may do so to express your disapproval and to serve as an example or warning to others who might otherwise engage in similar conduct.

If you find in favor of plaintiff and against a defendant, and if you find that the defendant acted so maliciously, wantonly, or oppressively as to warrant an award of punitive damages, you may make such an award. To justify an award of punitive damages, a defendant's misconduct must be based upon a reckless or callous disregard of the rights of the plaintiff, or a gross indifference towards them; you may also award punitive damages if a defendant acted to punish the plaintiff out of ill will or spite.

You may assess punitive damages against either or both of the defendants, or you may refuse to impose punitive damages at all. If punitive damages are assessed against more than one defendant, the amounts assessed against each defendant may be the same, or they may be different.

V. CONCLUDING REMARKS

Do not communicate with anyone outside the jury room except the court about your deliberations, or about anything else regarding this case. You may send a note to me, signed by your foreperson, through the Marshal to ask for help on the law or for any other assistance.

A 1449

Discuss the issues with respect for each other. Do not hesitate to change your mind after considering each matter. Each of you is individually responsible for your vote.

If you are divided, do not report how the vote stands. If you have reached a verdict, do not report what it is to anyone until you are asked in open court. Inform the court when you have reached a verdict; do not inform me what your verdict is.

Render your verdict without fear, without favor, without prejudice, and without sympathy.

A 1450**VERDICT SHEET**

(Page 1 of 2)

1A. Did Officer Randall falsely arrest the plaintiff on May 15, 2008?

YES	NO

1B. Did Officer Burbridge falsely arrest the plaintiff on May 15, 2008?

YES	NO

2A. Did Officer Randall maliciously prosecute the plaintiff?

YES	NO

2B. Did Officer Burbridge maliciously prosecute the plaintiff?

YES	NO

3A. Did Officer Randall violate plaintiff's constitutional right to a fair trial by knowingly presenting false evidence to the prosecutor?

YES	NO

A 1451

(Page 2 of 2)

3B. Did Officer Burbridge violate plaintiff's constitutional right to a fair trial by knowingly presenting false evidence to the prosecutor?

YES	NO

If you answer all of the above questions in the negative, do not continue to the following questions. If you answer one or more of the above questions in the affirmative, continue to the following questions.

4A. What amount of money, if any, is necessary to compensate the plaintiff for his injuries proximately caused by a violation of one or more of his rights by Officer Randall?

COMPENSATORY DAMAGES	\$
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4B. What amount of money, if any, is necessary to compensate the plaintiff for his injuries proximately caused by a violation of one or more of his rights by Officer Burbridge?

COMPENSATORY DAMAGES	\$
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5A. If damages are awarded pursuant to question 4A, and the plaintiff is entitled to punitive damages from Officer Randall, what punitive damages for breach of plaintiff's constitutional rights are awarded from Officer Randall?

PUNITIVE DAMAGES	\$
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5B. If damages are awarded pursuant to question 4B, and plaintiff is entitled to punitive damages from Officer Burbridge, what punitive damages for breach of plaintiff's constitutional rights are awarded from Officer Burbridge?

PUNITIVE DAMAGES	\$
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A1452

COURT'S EXHIBIT 5

Proposed Jury Charge, Dated April 17, 2012
(pp. A1452-A1465)

REPRODUCED FOLLOWING

A 1453

5

DRAFT: APRIL 17, 2012

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JOSHUA MARSHALL,

Plaintiff,

– against –

THE CITY OF NEW YORK, P.O. SALIM
RANDALL, Shield No. 15331, Individually
and in His Official Capacity, P.O. MICHAEL
BURBRIDGE, Shield No. 15488, Individually
and in His Official Capacity, and P.O.'s
"JOHN DOE" #1-10, Individually and in their
Official Capacities, (the name John Doe being
fictitious, as their true names are presently
unknown),

Defendants.

PROPOSED JURY CHARGE

10-CV-2714

for
4/18/12

JACK B. WEINSTEIN, Senior United States District Judge:

I. INTRODUCTION

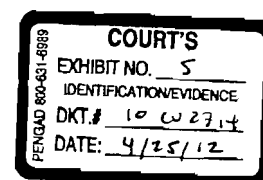
Ladies and Gentlemen of the jury:

I will instruct you on the law. It is your duty to follow these instructions. My
instructions will be in three parts.

First, regarding the general rules that define and govern the duties of a jury in a civil case.

Second, as to the legal elements of the claims asserted by the plaintiff, I will provide the
specific elements that the plaintiff must prove with respect to each of his claims to warrant a
finding of liability on the part of a defendant.

Third, giving you some guidance regarding your deliberations.



A 1454

Please read these instructions along with me. You may take them into the jury room.

You will have a list of documents and objects that were admitted into evidence. Ask for any of them or for a transcript of the testimony that you wish to see.

II. GENERAL RULES

A. Role of the Court and of the Jury

You are the sole judges of the facts. Decide which of the witnesses you believe, what portion of their testimony you accept, and how much weight you give to it.

I have no view regarding the liability of any defendant. Nothing that I have said or done should be used by you to infer that I have such a view.

Your verdict must be based exclusively on the evidence or lack of evidence in the case and the law as I explain it to you. Do not consider any personal feelings that you may have about the race, religion, national origin, ethnic background, gender, or age of the plaintiff or a defendant. Do not do any research of your own, by computer or otherwise.

B. All Parties and Witnesses Equal

No party is entitled to any sympathy or favor. All parties are equal before this court. The fact that the defendants are police officers does not entitle them to any greater or lesser consideration than the plaintiff.

C. Claims and Burden of Proof

Whenever I say that a party has the burden of proof on a particular issue, I mean that, considering all of the evidence in the case, the party's claim on that issue must be established as more probably true than not true. If the probabilities are equal—that is, in equipoise—the party has not met his burden.

A 1455

The plaintiff makes three claims. First, that he was arrested by the defendants after the *defendants did not see who threw the gun, but nonetheless* officers observed plaintiff's companion throw a gun into the street, and that the arrest was illegal *falsely alleged they saw plaintiff throw the gun even though* because his companion, rather than he, threw the weapon, and the police knew it. Second, that

criminal charges, based on fabricated evidence regarding the events leading to his arrest, were maliciously brought against him. Third, that one or both of the defendants violated his

constitutional right to a fair trial by presenting false evidence to state prosecutors in order to procure an indictment. *Since there was no judicial warrant for the arrest in this case, defendants have the burden of proving they*

Thus, the first issue is whether the plaintiff was falsely arrested by the defendants. The second issue is whether the plaintiff was maliciously prosecuted by the defendants. The third issue is whether the plaintiff was denied his constitutional right to a fair trial by the defendants. If and only if you decide one or more of these questions in the plaintiff's favor will you be required to consider the amount of damages to which the plaintiff is entitled.

they did not know who in fact threw it. had probable cause to arrest plaintiff.

The plaintiff has the burden of proving each element of his claims, except for the probable cause element of his false arrest claim. The burden is on a defendant, when an arrest is not made pursuant to a judicial warrant, to prove that he had probable cause to arrest.

D. Unanimity of Decision

Your decision on any issue must be unanimous. All of you must agree on the answer to questions on the verdict sheet I will give you.

E. Evaluation of the Evidence

You will have a list of witnesses. Ask for a transcript of any part of the testimony that you wish to see. Try to be specific.

Communicate with me in writing to ask for any evidence, help on the law, or any other matter. Give a note with your question to the Marshal.

A 1456

During the trial, objections were raised and rulings made. Draw no inferences from the frequency of objections or from whether objections were sustained or overruled. Where an objection to a question was sustained, disregard the question and draw no inferences from its wording. Where testimony was stricken, disregard it.

On occasion, I gave limiting instructions on how evidence could be used. Follow those instructions.

Give the evidence such weight as you think it deserves. Analyze the evidence dispassionately, rationally, and without prejudice or emotion.

You may draw reasonable inferences from the evidence. Testimony from the witnesses and the exhibits are evidence. A lawyer's questions without an answer, arguments, and the opening and closing statements are not evidence.

F. Witnesses

1. General Principles

Decide which testimony to believe and which not to believe. Consider the following: each witness's demeanor and manner of testifying; his or her opportunity to see, hear, and know about the events he or she described; the witness's ability to recall and describe those things; the reasonableness of the testimony in light of all of the other evidence in the case; and the interest of a witness in the outcome of the trial. Consider whether part of a witness's testimony was contradicted or supported by other testimony, by what that witness said or did on a prior occasion, and by the testimony of other witnesses or by other evidence.

If you find that a witness has willfully testified falsely as to an important matter, you may disregard the entire testimony, or you may accept as much of the testimony as you find true and

A 1457

disregard what you find false. A witness may have been mistaken or may have lied with respect to part of his or her testimony while having been accurate or truthful with respect to other parts.

Attorneys were entitled to interview witnesses outside of court to prepare for trial.

2. Testimony of Out-of-Court Declarants

You have heard evidence concerning what people outside the courtroom said about events. You are entitled to consider these statements as evidence. In evaluating these statements, remember that these individuals were not cross-examined before you when the statement was made. In considering the probative force of statements of individuals who have not testified, apply the same credibility tests that you apply with respect to individuals who have testified.

3. Testimony of Expert Witnesses

Persons described as experts are witnesses who have acquired specialized knowledge by education, experience, or training. They are permitted to give their opinions and to give the reasons for them.

In weighing their testimony, you should consider the factors that generally bear upon the credibility of any witness, as well as the witness's education, training and experience, the soundness of the reasons given for the opinion, and all other evidence in the case. You should also consider whether the assumptions on which the witness relied were proven.

G. Judicial Notice

The court has taken judicial notice of certain facts or events. You shall accept these facts or events as evidence and regard as proven any fact or event that has been judicially noticed.

A 1458

III. **CLAIMS OF PLAINTIFF**

Three claims are asserted by plaintiff under Section 1983 of Title 42 of the United States Code against police officers Salim Randall and Michael Burbridge.

Section 1983 provides a remedy for individuals who have been deprived of their constitutional rights under color of state law by state or local officials. It states that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subject, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured

To make out a claim under Section 1983, the plaintiff must prove:

First, that the defendant officers acted intentionally or recklessly.

Second, that the conduct complained of was committed by a person acting under color of state law;

Third, that this conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States, and

Fourth, that the defendants' acts were a proximate cause of damages sustained by the plaintiff.

A. Intentional or Reckless Conduct

An act is intentional if it is done knowingly, that is, if it is done voluntarily and deliberately, and not because of mistake, accident, negligence, or other innocent reason. An act is reckless if it is done in conscious disregard of its known probable consequences.

B. Color of State Law

The defendants, as New York City police officers, were acting under color of state law when they arrested plaintiff. This element is deemed proven.

A 1459

C. Deprivation of Constitutional Right**1. False Arrest**

Plaintiff Marshall claims that defendants Randall and Burbridge falsely arrested him on May 15, 2008, in violation of the Fourth Amendment of the Constitution.

A person is falsely arrested when (1) the defendant intended to confine the plaintiff; (2) the plaintiff was conscious of the confinement; (3) the plaintiff did not consent to the confinement; and (4) the confinement was not privileged.

The key issue for you on this claim is whether the arrest was privileged. Defendants contend that there was probable cause to arrest the plaintiff for the illegal possession of a firearm. The plaintiff contends that there was no probable cause to arrest him ~~for that or any~~ ^{observed} ~~other crime~~. If there was an objectively reasonable ground for the officers' belief that a crime ~~plaintiff with a gun~~ ^{had been, or was being, committed by the plaintiff}, then the arrest was privileged.

The existence of probable cause is measured at the moment of arrest. Whether charges ^{that the} ~~were dropped or whether the plaintiff was acquitted or convicted of a crime~~ ^{is irrelevant on this} ~~is irrelevant on this~~ ^{dismissed in deciding the issue of probable cause.} issue.

The failure of an officer to make a further inquiry before making an arrest, when a reasonable person would have done so, may, but does not necessarily, show a lack of probable cause. An officer is not required to conduct a full investigation prior to executing an arrest. But he may not ignore relevant evidence that he is aware of, or deliberately disregard facts he is aware of that tend to rebut the existence of probable cause to arrest.

A defendant has the burden of showing that probable cause existed for ~~the~~ ^{this} arrest.

A 1460

With regard to the substantive crimes on which plaintiff's arrest was premised, a person is guilty of the criminal possession of a weapon when he "possesses any firearm," except under limited circumstances not relevant here. *See* N.Y. Penal Law §§ 265.01(1), 265.20.

2. Malicious Prosecution

Plaintiff Marshall claims that defendant Randall and defendant Burbridge maliciously prosecuted him by providing false statements to, and withholding relevant evidence each was aware of, from a state prosecuting attorney. Plaintiff was indicted by a grand jury of three counts of the criminal possession of a weapon.

A person is maliciously prosecuted when (1) criminal proceedings are initiated or continued against him by the defendant; (2) the proceedings are terminated in his favor; (3) there was no probable cause for the commencement of the proceeding; and (4) a defendant's actions leading to the initiation of the proceeding against plaintiff were motivated by malice of the defendant.

There is no dispute that criminal proceedings were commenced and continued ^(with the assistance of) by the defendants against the plaintiff and that they ended in his favor. The charges against Marshall ^{on May 27, 2009} were dismissed ~~for failure to comply with speedy-trial rules—that is to say, he should have been tried sooner. That is deemed a termination favorable to the accused.~~

The critical decisions for you are whether there was probable cause for the commencement of the proceedings and whether either defendant's assistance in the commencement of the proceedings was motivated by malice.

Probable cause to prosecute exists when the facts and circumstances within the person's knowledge at the time he takes steps to proceed with the prosecution are sufficient for a person of reasonable prudence to believe that a violation of law was committed.

A 1461

You may infer malice based upon your a finding that the defendant lacked probable cause to initiate and continue

The question here is whether either or both of the defendant officers believed that there *with* was probable cause to initiate or assist in the prosecution of plaintiff.

A defendant initiates or continues a prosecution maliciously if he initiates or continues it *any charge against plaintiff.* for a wrongful purpose, that is, if his goal is not to bring an alleged offender to justice. For example, if he acts out of ill will or personal hostility towards a person accused, or he acts out of a desire to punish a person without due process, then he can be said to have acted with malice.

If probable cause existed for Officers Randall and Burbridge to present the evidence they did to the state prosecuting attorney, then you must find for the defendants on this claim. If no probable cause existed, but the defendants did not act with malice, then you must find for the defendants on this claim.

3. Constitutional Right to a Fair Trial

Every person has a right not to be prosecuted on the basis of information that is known by the government to be false. The government's doing so violates the Constitution.

The question for you on this claim is whether the defendants knowingly presented false *a deprivation of plaintiff's liberty.* information to the prosecutor, which led to ~~an indictment being issued against the plaintiff~~. If a defendant presented accurate evidence to the prosecutor, or presented inaccurate evidence without the requisite intent, then you must find for the defendant.

D. Proximate Cause

The third element that plaintiff must prove is that the acts of Officer Randall and Officer Burbridge were a proximate cause of injuries he sustained.

There can be more than one proximate cause. An injury or damage is proximately caused by an act or failure to act whenever the act or omission played a substantial part in bringing about or actually causing the injury or damage, and that injury was the direct or a reasonably

A 1462

probable consequence of the act or omission. To recover damages, Marshall has the burden of proving that he suffered an injury and that the injury would not have occurred without the wrongful conduct of the defendant.

IV. DAMAGES

If the plaintiff has proven liability on a claim, you must determine the damages to which he is entitled on that claim. Do not infer that he is entitled to recover damages merely because I am instructing you on this issue. It is exclusively your function to decide upon liability.

A. Compensatory and Nominal Damages ✓

If liability is proven on a claim, you must award the plaintiff sufficient damages against the defendants to compensate him for any injury proximately caused by Officer Randall and Officer Burbridge's actions that created the liability. Damages of this type are known as compensatory damages. Their purpose is to make a plaintiff whole.

The compensatory damages you award, if any, should be fair and reasonable, neither inadequate nor excessive. You should award damages only for injuries the plaintiff has suffered or is reasonably likely to suffer as a proximate result of the claim.

If you find both defendants are liable to the plaintiff on one or more of his claims, any amount of damages you award is to be assessed as against both defendants.

In awarding compensatory damages, you must be guided by dispassionate common sense. Use as much definiteness and accuracy as the circumstances permit.

If compensatory damages were nominal, you may award an appropriate sum, in the amount of a dollar or more.

B. Punitive Damages

A 1463

V. CONCLUDING REMARKS

Do not communicate with anyone outside the jury room except the court about your deliberations or about anything else regarding this case. You may send a note to me, signed by your foreperson, through the Marshal to ask for help on the law or for any other assistance.

Discuss the issues with respect for each other. Do not hesitate to change your mind after considering each matter. Each of you is individually responsible for your vote.

If you are divided, do not report how the vote stands. If you have reached a verdict, do not report what it is to anyone until you are asked in open court. Inform the court when you have reached a verdict; do not inform me what your verdict is.

Render your verdict without fear, without favor, without prejudice, and without sympathy.

A 1464**VERDICT SHEET****(Page 1 of 2)****1A. Did Officer Randall falsely arrest the plaintiff on May 15, 2008?**

YES	NO

1B. Did Officer Burbridge falsely arrest the plaintiff on May 15, 2008?

YES	NO

2A. Did Officer Randall maliciously prosecute the plaintiff?

YES	NO

2B. Did Officer Burbridge maliciously prosecute the plaintiff?

YES	NO

3A. Did Officer Randall violate plaintiff's constitutional right to a fair trial by knowingly presenting false evidence to the prosecutor?

YES	NO

A 1465

(Page 2 of 2)

3B. Did Officer Randall violate plaintiff's constitutional right to a fair trial by knowingly presenting false evidence to the prosecutor?

YES	NO

4. What amount of money, if any, is necessary to compensate the plaintiff for his injuries proximately caused by a violation of one or more of his rights?

COMPENSATORY DAMAGES	\$
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5. If no damages are awarded pursuant to question 4, but plaintiff is entitled to damages, what damages for breach of plaintiff's constitutional rights are awarded?

NOMINAL DAMAGES	\$
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A1466

COURT'S EXHIBIT 6

List of Witness
(pp. A1466-A1467)

REPRODUCED FOLLOWING

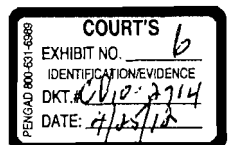
AI467

Marshall v. Randall et al.

10-CV-02714 (JBW)

List of Trial Witnesses

1. Police Officer Salim Randall, testified on 4/24/12
2. Police Officer Michael Burbidge, testified on 4/24/12
3. Plaintiff Joshua Marshall, testified on 4/24/12
4. Police Officer Kieran Fox, testified on 4/24/12
5. Police Officer Joseph Senz, testified on 4/25/12
6. Nena Lamouse-Smith, testified on 4/25/12



A1468

COURT'S EXHIBIT 7

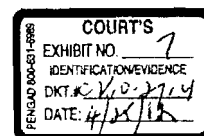
List of Exhibits
(pp. A1468-A1469)

REPRODUCED FOLLOWING

A 1469

Marshall v. Randall et al. 10-CV-02714 (JBR)List of Exhibits in Evidence

- ✓ Plaintiff's Exhibit 6 - Arrest Report
- ✓ Plaintiff's Exhibit 16 - Complaint Report + 16 (blowup)
- ✓ Plaintiff's Exhibit 17 - Criminal Court Complaint + blowup.
+ blowup
- ✓ Plaintiff's Exhibit 2 - Handwritten version of Complaint Report
- ✓ Plaintiff's Exhibit 1 - P.O. Randall's memobook + blowup
- ✓ Plaintiff's Exhibit 11 - UF250 for Plaintiff
- ✓ Plaintiff's Exhibit 18 - Certificate of Disposition
- ✓ Plaintiff's Exhibit 3 - Evidence Collection Team Report
- ~~Plaintiff's Exhibit~~
- ✓ Defendants' Exhibit F₁ - Enlarged photo corner of Broadway and Park Street
- ✓ Defendants' Exhibit D₁ - Enlarged photo of Park Street / Arrest scene
- ✓ Defendants' Exhibit C₁ - Enlarged photo of gun
- ✓ Defendants' Exhibit G - Photo of Park Street (right side)
- ✓ Defendants' Exhibit E - Photo of Park Street (left side)
- ✓ Defendants' Exhibit E₁ - Enlarged photo of Park Street (left side)



A1470

COURT'S EXHIBIT 8

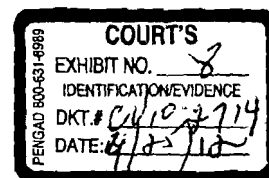
Jury Note

(pp. A1470-A1471)

REPRODUCED FOLLOWING

A 1471

ASKING FOR ALL
EVIDENCE!



A1472

COURT'S EXHIBIT 9

Jury Note

(pp. A1472-A1473)

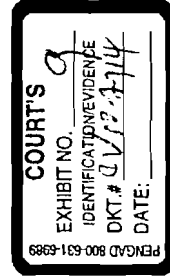
REPRODUCED FOLLOWING

A 1473

QUESTION:

CAN WE GIVE PUNITIVE
AWARD WITH OUT GIVING
COMPENSATORY?

"SECTION IV PART B"



A1474

COURT'S EXHIBIT 10

Jury Note

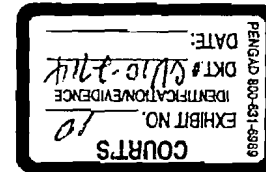
(pp. A1474-A1475)

REPRODUCED FOLLOWING

A 1475

Punitive Damages Follow Up

Your honor, we had reviewed the packet one additional time and had found the wording in ~~the~~ section IV part b to be confusing. We wanted to ask first before making our ruling. You have since clarified the confusion.



A1476

COURT'S EXHIBIT 11

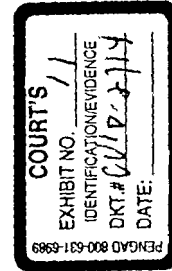
Jury Note

(pp. A1476-A1477)

REPRODUCED FOLLOWING

A 1477

WILL ALL COME BACK
TOMORROW @ 11:00 AM
4/26/12.



A1478

VERDICT SHEET
(pp. A1478-A1481)

REPRODUCED FOLLOWING

A 1479

Case 1:10-cv-02714-JBW-VVP Document 85-1 Filed 05/18/12 Page 1 of 3 PageID #: 1139

EXHIBIT A

A 1480

Case 1:10-cv-02714-JBW-VVP Document 85-1 Filed 05/18/12 Page 2 of 3 PageID #: 1140

VERDICT SHEET

(Page 1 of 2)

1A. Did Officer Randall falsely arrest the plaintiff on May 15, 2008?

YES	NO
✓	

1B. Did Officer Burbridge falsely arrest the plaintiff on May 15, 2008?

YES	NO
✓	

2A. Did Officer Randall maliciously prosecute the plaintiff?

YES	NO
✓	

2B. Did Officer Burbridge maliciously prosecute the plaintiff?

YES	NO
✓	

3A. Did Officer Randall violate plaintiff's constitutional right to a fair trial by knowingly presenting false evidence to the prosecutor?

YES	NO
✓	

A 1481

Case 1:10-cv-02714-JBW-VVP Document 85-1 Filed 05/18/12 Page 3 of 3 PageID #: 1141

(Page 2 of 2)

3B. Did Officer Burbridge violate plaintiff's constitutional right to a fair trial by knowingly presenting false evidence to the prosecutor?

YES	NO
✓	

If you answer all of the above questions in the negative, do not continue to the following questions. If you answer one or more of the above questions in the affirmative, continue to the following questions.

4A. What amount of money, if any, is necessary to compensate the plaintiff for his injuries proximately caused by a violation of one or more of his rights by Officer Randall?

COMPENSATORY DAMAGES	\$ 70,000
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4B. What amount of money, if any, is necessary to compensate the plaintiff for his injuries proximately caused by a violation of one or more of his rights by Officer Burbridge?

COMPENSATORY DAMAGES	\$ 70,000
----------------------	-----------

5A. If damages are awarded pursuant to question 4A, and the plaintiff is entitled to punitive damages from Officer Randall, what punitive damages for breach of plaintiff's constitutional rights are awarded from Officer Randall?

PUNITIVE DAMAGES	\$ 25,000
------------------	-----------

5B. If damages are awarded pursuant to question 4B, and the plaintiff is entitled to punitive damages from Officer Burbridge, what punitive damages for breach of plaintiff's constitutional rights are awarded from Officer Burbridge?

PUNITIVE DAMAGES	\$ 25,000
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A1482

ORDER, DATED APRIL 27, 2012
(pp. A1482-A1483)

REPRODUCED FOLLOWING

A 1483

Case 1:10-cv-02714-JBW-VVP Document 77 Filed 04/30/12 Page 1 of 1 PageID #: 1097

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JOSHUA MARSHALL,

Plaintiff,

- against -

SALIM RANDALL and MICHAEL
BURBRIDGE,

Defendants.

ORDER

10-CV-2714

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
★ APR 30 2012
BROOKLYN OFFICE

JACK B. WEINSTEIN, Senior United States District Judge:

On consent of the parties, the City of New York and the anonymous defendants named by plaintiff in his complaint are dismissed as defendants.

SO ORDERED.



Jack B. Weinstein
Senior United States District Judge

Date: April 27, 2012
Brooklyn, New York

A1484

NOTICE OF APPEAL, DATED JUNE 15, 2012
(pp. A1484-A1485)

REPRODUCED FOLLOWING

A 1485

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
JOSHUA MARSHALL,

Plaintiff,

-against-

THE CITY OF NEW YORK, et al,

Defendant.
-----X

NOTICE OF APPEAL

10 CV 2714 (JBW)

PLEASE TAKE NOTICE that the defendant hereby appeals to the United States Court of Appeals for the Second Circuit, from the judgment of the Honorable Jack B. Weinstein, herein entered June 6, 2012.

This appeal is taken from each and every part of said judgment as well as from the whole thereof.

Dated: New York, New York
June 15, 2012

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
Attorney for Defendant
100 Church Street
New York, New York 10007
(212) 788-1010

By:



LEONARD KOERNER
Chief, Appeals Division

COHEN & FITCH LLP
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CLERK
Eastern District

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2012 JUN 18 PM 12:37
U.S. DISTRICT COURT
EASTERN DISTRICT
OF NEW YORK